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ADMINISTRATIVE LAW SECTION of AMERICAN BAR ASSOCIATION

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1955 MID-WINTER MEETING RESOLUTIONS PROPOSED BY SECTION ADOPTED BY HOUSE OF DELEGATES

The Section proposed seven resolutions for adoption by the House of Delegates at its 1955 mid-winter meeting, held in Chicago in February. All were adopted by the House.

The first four resolutions, for amendment of the Section By-laws, were presented pursuant to action of the 1954 annual meeting of the Section. The first resolution amended Article III, Section 2, to make the Section Delegate a member of the Council, and thus to authorize him to participate in Council votes as he regularly does in the consideration of Council business. The second resolution amended Article III, Section 3, to provide for one-year terms for the Section Chairman, Vice-Chairman and Secretary (thus abandoning the two-year terms initiated by amendment of the By-laws two years ago, which had

CONTENTS

	PAGE
1955 Mid-winter Meeting—Resolutions Proposed by Section Adopted by House of Delegates.....	43
Procedure Act Cases During 1954.....	47
Other 1954 Federal Cases.....	60
Chairman's Page	85
Directory of Section Members.....	89

Nothing contained herein shall be construed as the action of the American Bar Association unless the same shall have been first approved by the House of Delegates or the Board of Governors.

been demonstrated by experience to impose too severe a burden, especially on the Chairman); the amendment is applicable to the present officers, elected at the last annual meeting. The third resolution amended Article IV, Section 1, regarding nominations, to conform to the amendment effected by the second resolution. The fourth resolution incorporated in Article VI, Section 1, which defines the authority of the Council, the following sentence:

“During the interval between meetings of the Section, the Council shall have full authority to act for the Section in any way in which the Section itself would be authorized to act, and any such action taken by the Council pursuant to this provision shall be reported to the members of the Section at the next annual meeting of the Section.”

The report of the Section to the House of Delegates commented on this amendment as follows:

“ * * * The amendment is proposed following the 1953 amendment of the last sentence of Section 1 of Article XI of the By-laws of the Association. Especially in view of the nature of the Section's activity, dealing as it frequently does with immediate problems affecting pending legislation or administrative proposals, authority to act in the intervals between annual Section meetings appears to be imperative. It would still be the policy of the Council, so far as it is feasible to do so, to submit for consideration at Section meetings matters that are likely to be the subject of legislative or administrative action during the coming year, and to request specific authority to deal with such matters rather than to rely on the general authority that the amendment would confer. * * * ”

The fifth resolution adopted by the House of Delegates had been approved by the 1954 annual meeting of the Section on the report of its Special Committee on a Code of Conduct for Government Employees. The text of the resolution is printed in the August issue of the Bulletin (6 Ad. L. Bul. 173). It disapproves S. 3142, 83d Cong., in the form in which it was introduced (by Senators Douglas, Humphrey and Morse); approves and recommends the enactment of Titles I and II thereof (declaring the policy of promoting high moral standards in the conduct of government, and establishing a Commission on Ethics in Government to study and recommend methods of improving such

standards); and approves in principle Titles III and IV thereof (establishing separate detailed codes for the executive and legislative branches, and providing sanctions and machinery for enforcement by consequences applicable to employees and those private citizens who violate the code in dealing with employees). On the ground that further study is required, the resolution takes no position with respect to Title V of S. 3142, which would require a full report of personal financial status and transactions by employees in any branch of the Government receiving salaries at the rate of \$10,000 or more or holding positions of GS-15 or above. The resolution as presented to the House of Delegates offered, finally, two alternatives: that the matter be referred for further action to a special committee of the Association on Standards of Ethical Conduct for Public Officials, or that it be referred to the Association's Committee on Civil Service.

A resolution on the same subject had been presented by the Section to the House of Delegates at the 1953 mid-winter meeting, which was similar to the present resolution but did not offer the alternative of reference to the Standing Committee on Civil Service rather than to a new special committee. At the 1953 annual meeting the House of Delegates decided against creating a special committee at that time, and directed the Section to study the matter further and report again. The report of the Section on this subject to the 1955 mid-winter meeting of the House, after such further study, ended as follows:

"As to the final question, how the Association should be represented in further consideration of this subject: Our view is that the range of such legislation, and of the activity of the proposed Commission, goes far outside the field of the ordinary activity and special competence of this Section and, further, that representation of the Association on this subject, including not only detailed consideration of legislation of this character but also detailed counseling with any such Commission as may be established, could be carried on more effectively by a committee than by a section. If the House is still of the view that a special committee should not be created for this purpose, the proposal is that the subject be referred to the Standing Committee on Civil Service."

The House of Delegates adopted the alternative of referring the matter to the Association's Committee on Civil Service.

The sixth resolution adopted by the House of Delegates, based on a report of the Committee on Labor (6 Ad. L. Bul. 218), was as follows:

RESOLVED, That the American Bar Association is opposed to the proposal that has been seriously pressed at the past session of the Congress to transfer jurisdiction over unfair labor practice cases from the National Labor Relations

Board to the Federal District Courts; and

FURTHER RESOLVED, That the Section of Administrative Law be authorized to take appropriate action to make this opposition effective.

In approving this resolution for presentation to the House of Delegates, the 1954 annual meeting of the Section authorized the Council to refer the matter to the Section of Labor Relations Law and to reconsider the action to be taken if that Section disagreed. The Section of Labor Relations Law concurred in the proposal.

Among the arguments advanced to the House in support of the resolution, the most effective appears to have been the argument that transfer of jurisdiction to diverse Federal District Courts would impair the desirable uniformity of decision accomplished through centralized adjudication by the Board.

The seventh resolution adopted by the House of Delegates, formulated by the Council at its mid-winter meeting under authority conferred by the 1954 annual meeting of the Section on consideration of the report of its Special Committee on Administrative Agency Fees and Charges (6 Ad. L. Bul. 160), was as follows:

RESOLVED, That the American Bar Association urges the repeal of Title V, entitled "Fees and Charges," of the Independent Offices Appropriations Act, 1952, 65 Stat. 268, 290; and

FURTHER RESOLVED, That in the opinion of the American Bar Association no schedule of agency fees and charges of the character specified in said Title V

ERRATUM

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The first and twentieth lines on page 4, each beginning with the word "Court", have been transposed.

should be adopted unless first authorized by specific legislation dealing with the particular subject-matter or agency; and

FURTHER RESOLVED, That the Section of Administrative Law be authorized to take appropriate action in behalf of the Association to make these views effective.

In support of this resolution the Section submitted to the House on February 21 a supplemental report setting forth the proposed resolution and continuing as follows:

STATEMENT OF REASONS FOR RECOMMENDATION

Title V of the Independent Offices Appropriations Act, 1952, is as follows:

"TITLE V—FEES AND CHARGES

"It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may

prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided*, That nothing contained in this title shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price; *Provided further*, That nothing contained in this title shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price."

On November 5, 1953, the Bureau of the Budget addressed to the Heads of Executive Departments and Establishments a circular designed to implement this legislation, stating in part:

"It shall be the policy of Federal agencies engaged in licensing activities to provide a system of fair and equitable fees which, taking account of the value to the recipient and the public policy or interest served, shall recover, to the full extent possible, the aggregate cost incurred in the conduct of these activities",

and directing the heads of such agencies to prepare schedules of fees accordingly and to report to the Bureau.

Before any such fee schedules were put into effect, the Senate Committee on Interstate and Foreign Commerce adopted a resolution declaring that the charging of such fees should be postponed until July 1, 1955.

Title V and the Budget circular have been considered in detail through the Section's Special Committee on Administrative Agency Fees and Charges, and were the subject of extended discussion at the 1954 Annual Meeting of the Section, which authorized the Council to present to the House of Delegates resolutions opposing the adoption of fee schedules as proposed thereby. The resolutions presented herewith were adopted by the Council at its Midyear Meeting.

In the considered view of the Section the propriety of agency charges of this character must depend on the particular nature of the agency activity involved, its relation to public and private interests, and other variable factors. Any general program of recovering from those subject to administrative agency procedures "to the full extent possible, the aggregate cost incurred in the conduct of these activities" is in our view unjustified as a matter of public policy. We are of the opinion, further, that the only proper way of dealing with this matter is for the Congress to prescribe either the fees to be charged in particular matters or the detailed method by which, and the limitations under which, the agency may properly determine the fees to be charged in particular matters.

We respectfully request that the House of Delegates approve these views, and con-

fer on the Section authority to deal with these matters with the Congress, the Bureau of the Budget and the agencies, by adopting the recommended resolutions.

Respectfully submitted,

ROBERT M. BENJAMIN,
Chairman

PROCEDURE ACT CASES DURING 1954

APPLICABILITY.—As is well known, the Supreme Court in *Wong Yang Sung v. McGrath*, 339 U. S. 33 (1950)—still the leading case under the APA—held that deportation proceedings were subject to the procedural requirements of the Procedure Act. Shortly after the *Wong Yang Sung* decision, the Congress, in the Supplemental Appropriations Act, 1951, expressly exempted deportation proceedings from the APA and, in 1952, the whole subject of immigration, including procedures, was codified in the Immigration and Nationality Act. The question that has since arisen is whether proceedings held under the 1952 immigration law are subject to the APA. That question has been answered in the negative by *Marcello v. Ahrens*, 212 F. 2d 830 (5th Cir. 1954), certiorari granted, 348 U. S. 805 (1954). Although the Immigration and Nationality Act of 1952 had • repealed the rider to the Supplemental Appropriations Act, 1951, which had exempted deportation proceedings, it set up in its stead a specific procedure to be followed in deportation cases and expressly

declared in Section 242(b) that "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." According to the court, since Congress has provided a "sole and exclusive" procedure for determining the deportability of an alien, therefore, the *Wong Yang Sung* case is no longer applicable. A deportation proceeding now clearly comes within the saving clause of Section 7(a) of the APA, which exempts from the purview of that Act "specified classes of proceedings * * * specially provided for by or designated pursuant to statute." "We hold, therefore, that to the extent the proceedings prescribed, by section 242(b) are inconsistent with the Administrative Procedure Act, the requirements of the latter Act are inapplicable to the deportation proceedings." *Id.* at 836. See, similarly, *Couto v. Shaughnessy*, 123 F. Supp. 926 (S. D. N. Y. 1954); *Suarez Seja v. Landon*, 124 F. Supp. 871 (S. D. Cal. 1954). Compare *Farquharson v. Landon*, 217 F. 2d 603 (9th Cir. 1954).

Nor could it validly be claimed that the alien was entitled by due process to the safeguards of the APA. "With respect to the contention that deportation proceedings must be measured by and equated to the Administrative Procedure Act we think it sufficient to say that we agree with the district court that the Administrative Procedure Act is not the sole criterion of due process of law * * *. 'It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights.'" 212 F. 2d

at 837. See, similarly, *Sigurdson v. Landon*, 215 F. 2d 791 (9th Cir. 1954). But compare the significant statement by Justice Jackson in *Wong Yang Sung v. McGrath*, 339 U. S. at 50-51, where he said that to construe the Immigration Act as not subject to the APA might bring "it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake."

In *Spiegel, Inc. v. United States*, 116 F. Supp. 67 (D. C. 1951), an opinion published in 1954, it was held that the APA does not apply to proceedings of the Postmaster General in fixing parcel post rates.

PUBLIC INFORMATION.—In *Hotch v. United States*, 208 F. 2d 249 (9th Cir. 1953), the court reversed a conviction based upon the violation of a regulation of the Department of the Interior extending the period closed to commercial fishing on a certain Alaska inlet. The court held the regulation to be ineffective since it had not been published in the Federal Register. The United States then petitioned for a rehearing on the ground that publication was not necessary to make the regulation

in issue effective against the defendant in this action since the defendant had actual notice of the extended closed period.

In denying the Government's petition for rehearing, *Hotch v. United States*, 212 F. 2d 280 (9th Cir. 1954), the court declared that the fact that the defendant had actual knowledge of the regulation made no difference. Both the APA and the Federal Register Act require the publication of agency rules and the APA requires, in addition, publication of a notice of proposed rule-making before the rule is promulgated. Nor does the provision in the Federal Register Act that "No document required under section 305(a) of this chapter to be published in the Federal Register shall be valid *as against any person who has not had actual knowledge* thereof until" it has been filed for publication alter the result here. The section just quoted (Section 7 of the Federal Register Act) does not, according to the court, imply, as the Government asserted, that the referred to document or rule would be valid without publication as to a person who has actual notice. For Section 7 must be read in connection with Section 2 which it modifies. Section 2 sets up a requirement in addition to publication, i.e., it provides that an original and two duplicate originals of a proposed rule must be filed. And Section 7 provides that a proposed rule is not valid, although published, until those duplicate originals have been filed. An exception to the requirement of *filing the duplicate originals* is made in the circumstances where the interested party has had *actual notice*. But no exception is made to the

independent requirement of publication, nor can Section 7 of the Federal Register Act be inferred to intend such an exception, particularly in view of the reiteration of the requirement of publication found in subsections 3(a) and (c) of the APA.

The court goes on to state what is clearly the proper approach in cases involving alleged violations of laws imposing procedural requirements upon the administration. "While the Administrative Procedure Act and the Federal Register Act are set up in terms of making information available to the public, the Acts are more than mere recording statutes whose function is solely to give constructive notice to persons who do not have actual notice of certain agency rules. The Acts set up the procedure which must be followed in order for agency rulings to be given the force of law. Unless the prescribed procedures are complied with, the agency (or administrative) rule has not been legally issued, and consequently it is ineffective." 212 F. 2d at 283.

In the course of its opinion, the court also dealt with the question of whether notice of proposed rule-making under Section 4(a) of the APA had to be published where the defendant had actual notice of the rule he was charged with violating. It was held that the provision in Section 4(a) eliminating the necessity of publication of a notice of proposed rule-making where "all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law" did not apply to this case. "It will be noted that the only exception from the necessity

of publication is where the persons subject to a particular rule are specifically named, and even then only if they are also either personally served or have actual notice. In the instant case, neither the statute fixing closed periods * * * nor the proposed regulations extending the statutory closed period * * * names the persons subject thereto. Therefore, the excepting clause to the requirement of publication in section 4(a) of the Administrative Procedure Act as to persons with actual notice does not apply." *Id.* at 282.

Compare *Lynsky v. United States*, 126 F. Supp. 453 (Ct. Cl. 1954) (publication in Federal Register held legal notice to all the world).

Another case in which reliance was placed on Section 3 of the APA on review is *Foreman and Clark, Inc. v. NLRB*, 215 F. 2d 396 (9th Cir. 1954). Petitioner there contended that the NLRB was precluded from reconsidering its original decision with respect to an election to determine the bargaining representative of petitioner's employees because the Board's action was contrary to Section 3(a) of the APA, in that "no statements of the nature or requirements of the formal or informal procedures available have been published by the Board in the Federal Register". The court rejected this claim (whose basis does not, it should be stated, appear clearly from the reported decision), Judge Lemmon declaring: "There is no merit to this contention. The clear purpose of Section 3(a), *supra*, is to provide a *shield* for a petitioner before the Board, or other agency, to protect him from being penal-

ized for failing to resort to unpublished methods of procedure. It is not a *sword* by which a petitioner can strike down the agency's order, on the ground that the agency *has not authorized itself* to issue that type of order, by publishing a statement in the Federal Register!" *Id.* at 410.

According to the Court of Appeals for the Fifth Circuit, in view of the fact that the Federal Petroleum Board's authority to issue and enforce subpoenas is derived from an express statute, the Board's non-compliance with the publication provisions of the APA did not disentitle the Board to issue and enforce a subpoena. *Kilgore Nat. Bank v. Federal Petroleum Board*, 209 F. 2d 557 (5th Cir. 1954).

Another interesting public information case is *United States v. 449 Cases*, 212 F. 2d 567 (2d Cir. 1954) which arose out of a libel by the Government under the Federal Food, Drug, and Cosmetic Act, seizing 449 cases of tomato paste allegedly adulterated within the meaning of the Act in that it consisted wholly or in part of decomposed substance. The majority of the court held that the Government was entitled to condemnation of the food in question upon a showing that it contained tissues rotted (molds), but not necessarily deleterious to health. In a strong dissent, Judge Frank asserted that the mere presence of mold in a can does not necessarily make the food product adulterated. Unless the Administrator issues a standard relating to tomato paste, with specific reference to the percentage of mold, he should not be permitted to seek confiscation. According to the dissent, "Unless this power is in

some way constrained (as I believe it has been by the Administrative Procedure Act), it permits dangerous administrative arbitrariness: The Administrator may one day confiscate Smither's food product because it contains 10% of mold; the next day confiscate Williams' because it contains 15%; and the day after, Robinson's because it contains 40%." *Id. at 577*. Indeed, Judge Frank goes on, unless the Administrator publishes the standard which actually does guide his agency in determining when to seek condemnation, his action is void under section 3(a)(3) of the APA which requires the publication of "statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public." The opinion of Judge Frank declares that the Administrator's determination that food containing a certain percentage of mold is "decomposed" and therefore subject to condemnation under the Act is both an interpretation of the Act and a statement of policy as to standards. As such, that determination should be published in the Federal Register in accordance with the provisions of Section 3(a)(3) of the APA.

In this case, concludes the dissent on this point, the Administrator did not comply with this provision of the APA. Indeed, one of the government experts testified in this case that the Administrator, since the seizure here, had changed his standard; but no standard whatever, relative to mold in tomato paste, had ever been published in the Federal Register. It was to avoid this very sort of thing, it

should be noted, that the drafters of the APA drew up Section 3(a)(3).

RULE-MAKING.—That rule-making procedure under the APA is normally informal, subject only to the requirements of Section 4, is the basis for the decision of Judge Harlan in *Air Line Pilots Ass'n Internat'l v. CAB*, 215 F. 2d 122 (2d Cir. 1954). It grew out of an application to Judge Harlan as a single member of the court of appeals for a stay of the effectiveness of Special Civil Air Regulation SR-405 revising the regulation governing the maximum hours or periods of service of airmen by relaxing the eight-hour rule under prescribed conditions, pending hearing and determination of a petition for review. Among other grounds, it was claimed that the procedure followed by the Board failed to meet the requirements of the Administrative Procedure and Civil Aeronautics Acts. Judge Harlan held that this was not so. The Special Air Regulation involved here is easily within the definition of a "rule" as contained in Section 2(c) of the APA. And the procedure pursued by the Board conforms to the "rule-making" requirements of Section 4 of that Act. Petitioners had actual notice of proposed rule-making and were afforded an opportunity, of which they availed themselves, to participate in the proceedings through submission of written data, views, and oral argument. The fact that the Board did not proceed by way of the more formal route provided in Sections 7 and 8 of the APA is of no moment in this proceeding, since such procedure is required only where "rules are required by

statute to be made on the record after opportunity for an agency hearing”.

Compare *Logansport Broadcasting Corp. v. United States*, 210 F. 2d 24 (D. C. Cir. 1954) (agency may choose whether to proceed by rule-making or adjudication in a given case; Section 4(b) of APA does not require agency at conclusion of rule-making proceeding, to issue statement demonstrating that it has considered all relevant evidence before it).

In *Colorado Interstate Gas Co. v. FPC*, 209 F. 2d 717 (10th Cir. 1953, on rehearing 1954), a rate-making case (and, hence, a formal rule-making proceeding under the APA), the gas company contended that the proceedings were fatally defective because it was not given the notice required by Section 4(a) of the APA. Its contention in this respect was that it was not notified or advised of the contentions of the Commission's Staff. It pointed to the fact that the Staff introduced three cost of service studies relating to the years 1951, 1952 and 1953 and did not definitely state which one it stood on until after the hearings were closed. The court held, however, that the notice to which the company was entitled prior to trial under Section 4(a) was not of the position the Staff (the prosecuting agency) would take at the hearing. Under Section 4(a) it was entitled to notice of “a description of the subjects and issues involved” in the proceeding and such notice it had. There was never any doubt as to the issues and matters involved in the hearing. The company, like the Staff, introduced three alternative cost of service studies during the hearing. It is without dispute that

the company's operations in 1952 were taken as the test period and that the company at all times knew of the contentions made with respect to such operations and had ample opportunity to meet them and prepare its case.

AVAILABILITY OF EXAMINER.—Among the interesting cases that have arisen under the APA are those involving the first sentence of Section 5(c) which provides that the examiners who preside at the hearing shall make the initial or recommended decision “except where such officers become unavailable to the agency.” In *NLRB v. Stocker Mfg. Co.*, 185 F. 2d 451 (3d Cir. 1950) and *NLRB v. Dixie Shirt Co.*, 176 F. 2d 969 (4th Cir. 1949), it had been held that, where the examiner who had presided at the hearing died before he could prepare his intermediate report, he clearly became “unavailable” within the meaning of the above-quoted portion of Section 5(c) of the APA, and the agency could substitute another examiner to prepare the report. (For an analogous pre-APA case, see *S. Buchsbaum & Co. v. FTC*, 153 F. 2d 85 (7th Cir. 1946).)

In *Gamble-Skogmo, Inc. v. FTC*, 211 F. 2d 106 (8th Cir. 1954), it was claimed that the Commission's order was invalid because the trial examiner, before whom all of the testimony in the case had been taken, and who had the matter duly submitted to him on briefs and oral argument, was thereafter, because of his having reached the age of 70 years and being eligible for an annuity and having thus become subject to being automatically retired under the relevant provisions of the Civil Service

Retirement Act, treated by the Commission as being legally unavailable for further official duty in the proceeding. The Commission had thereupon made designation of a substitute trial examiner (who, it should be noted, was a man 76 years of age, but who did not yet have the number of years of service required to entitle him to a retirement annuity) for the purpose of having him prepare a recommended decision in the case and make findings and conclusions on the basis of the evidence taken by the initial trial examiner. The Commission denied a motion on the part of the petitioner to disqualify the substitute trial examiner and to continue the employment and status of the initial trial examiner to the extent of permitting him to make his findings, conclusions and recommended decision in the situation, which, it was asserted, he was willing and able to do. The Commission also denied an alternative motion to strike the evidence and record in the case and to require the substitute trial examiner to engage in a *de novo* hearing.

In reaching its decision, the court emphasizes what it calls the remedial emphasis and object of the first sentence of Section 5(c) of the APA. According to it, the primary concern of the provision was to prescribe a procedural guaranty that recommended or initial decisions, which were to be submitted by a trial examiner to an administrative tribunal for its consideration or guidance, would in general be made by the examiner who had conducted the hearing and received the evidence, and not by some other examiner. The object and the consequence of this

guaranty would inherently be to make direct credibility evaluation by a trial examiner constitute a processive element or factor in the arriving at of intermediate administrative findings, conclusions and decisions, submitted to an agency, in the functioning of the examiner system. "We do not believe that Congress fairly can be charged with having intended to grant the general procedural benefit of direct credibility evaluation on a wholly arbitrary basis-giving it with absoluteness to such parties as would not, and denying it with absoluteness to such parties as would, fortuitously become subject to a situation of examiner unavailability." *Id.* at 114.

The exception in Section 5(c), the court goes on, was not intended to apply in all cases where examiners were to become unavailable. "It seems to us that such excusing of adherence to the prescription here involved as has been practically permitted in situations of examiner unavailability should be regarded as intended, not to arbitrarily exclude any person on fortuitous circumstance from the benefit of a proper credibility evaluation, where that process is capable of affecting the examiner's result, but rather to merely waive the universality or absoluteness of the prescription * * * to the extent of permitting nonobservance in case of examiner unavailability, only where credibility evaluation as such can be said to not be necessary or capable of constituting a material factor in the reaching of a recommended or initial decision." *Ibid.*

Applying this principle, the court holds the FTC action invalid. "On all these considerations, we are of the opinion that,

under section 5(c) of the Administrative Procedure Act, the Commission had a right here to refuse to strike the evidence and the record and to not require the substitute examiner to engage in a *de novo* receiving of evidence, either in whole or in part, only if it fairly could be said that a credibility evaluation from hearing and seeing the witnesses testify was unnecessary, in the sense that a direct choice in personal credibility as between them would not have to be made or would not from the nature of the situation be capable of being of material assistance, in the attempt of the substitute examiner to arrive at the controlling facts." *Id.* at 115. Since credibility evaluation on a personal basis was found to constitute a salient factor in the recommended decision by the substitute examiner, the Commission should have granted the motion for a *de novo* hearing.

However desirable the result reached by the court may be, one wonders whether it is justified by Section 5(c) of the APA. It may be that the first sentence of that section *should* read as the court interprets it; but whether it *does* is quite another thing. It may well be that the court was induced to stretch the language of the APA to reach what seems to be a desirable result by the apparent arbitrary refusal of the FTC to extend the availability of the original trial examiner. Certainly he could have been continued in employment solely for the purpose of completing the instant case. That his age did not, in the Commission's own view, of itself, make him incompetent to do this is shown by the fact that the substitute examiner himself was 76 years of age. Nor is it easy to see

why the original examiner lost the competence which induced the agency to designate him for the case simply because of the occurrence of his 70th birthday (especially since, as soon as he was separated from the FTC, he was taken on as a trial examiner by another agency). It would seem, however, that the same result could have been reached, without any need to indulge in what seems to be judicial legislation, by holding that the original examiner was not "unavailable" within the meaning of Section 5(c).

RECOMMENDED DECISIONS.—Under Section 8(a) of the APA, "Whenever the agency makes the initial decision without having presided at the reception of the evidence, [the examiner] shall first recommend a decision except that in rule making or determining applications for initial licenses * * * (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires."

It is clear, from the intent of the draftsmen of the APA, that the discretion thus given to the agencies in rule-making and initial license proceedings should not be used as a general escape-clause through which they can avoid the recommended-decision procedure required by Section 8(a). Under the case law, however, it would seem that, even if an agency refuses to exercise the proper restraint and uses the discretion given it to get around the procedure intended by the APA, there is not much that the courts can do about it. *Colorado Interstate Gas Co. v. FPC*, 209

F. 2d 717 (10th Cir. 1953, on rehearing 1954), is an illustrative case. Petitioner there contended that the dispensing with the filing of the trial examiner's intermediate report voided the order of the Commission. The court conceded that Congress intended that party contestants before the Commission are as a matter of right entitled to the benefits of the intermediate report save only in the two exceptions noted in Section 8(a) of the APA. But, continued the court, under the exceptions in 8(a), the Commission may in the exercise of a sound discretion either upon its own volition or upon the application of any party to the proceeding dispense with the filing of the report. Appearing in the record, the reasons assigned by the Commission for its action in this respect were that there was good reason to believe that the rates being exacted were excessive; that an unjust exaction was being demanded from the gas users; that the case had been pending for three years and that it was to the benefit and interest of all that the matter be speedily adjudicated. "These are cogent reasons supporting the action of the Commission under a statute vesting it with authority to dispense with the intermediate report in a case such as this." *Id.* at 722.

There was, it should be noted, a strong dissent by Judge Bratton, who stated that the action of the Commission in omitting the intermediate decision procedure constituted error. Where an examiner is named in a proceeding of this kind and he conducts the hearing, the intermediate decision procedure is the general rule; and its omission is the exception. The omis-

sion of the intermediate decision procedure is warranted only where the Commission makes a well founded and sustainable finding that due and timely execution of the functions of the Commission imperatively and unavoidably so requires. *Id.* at 731.

Judge Bratton insisted upon the need for the examiner to report his conclusions in a case like this. "Virtually all of the testimony was given by expert witnesses. But their credibility and the weight to be given to their testimony were matters for consideration in resolving conflicts in the testimony respecting basic facts upon which the outcome of the proceeding depended at least in part. The examiner saw the witnesses and observed their demeanor while testifying. He was in the best position to determine their credibility and weigh their testimony. There are no underlying facts apparent upon the face of the record to support the finding that due and timely execution of the functions of the Commission imperatively and unavoidably required the omission of the intermediate decision procedure. And in the circumstances, the omission of such procedure was prejudicial error." *Id.* at 732.

AVAILABILITY OF REVIEW.—*Tom Mung Ngow v. Dulles*, 122 F. Supp. 709 (D. C. 1954), was an action by one who was outside the country for a declaratory judgment that plaintiff was a citizen of the United States. The defendant moved to dismiss the complaint on the ground that the action did not lie. In denying the motion, Judge Holtzoff relied primarily on the APA, one of whose objectives was said

to be to expand judicial review of administrative actions. After quoting 10 (a-c) and statements from their legislative history, he declared: 'It is inconceivable how the Congress could have expressed more emphatically or more unequivocally its intention to subject every final agency action to judicial review at the behest of any person adversely affected by it, with the sole exceptions of actions in respect to which statutes preclude judicial review, and activities committed by law to agency discretion. Final action of any governmental agency declining to recognize a claim to citizenship, is obviously, therefore, subject to judicial review under the Administrative Procedure Act. No subsequent legislation may be construed as superseding or modifying this right unless it does so expressly.' *Id. at 712*. And, according to Judge Holtzoff, the Immigration and Nationality Act of 1952 cannot be construed as limiting the right of review granted by the APA.

Compare *Union Producing Co. v. FPC*, 127 F. Supp. 88 (D. C. 1954), where Judge Holtzoff held that an action to enjoin the FPC from enforcing against plaintiff orders requiring natural gas companies to file rate schedules with the Commission and apply thereto for certificates of public convenience and necessity was maintainable under the APA.

PRECLUSION OF REVIEW.—In *Brewer v. United States*, 117 F. Supp. 842 (E. D. Tenn. 1954), the court held that it was without jurisdiction to review a decision of the Administrator of Veterans' Affairs rejecting the claim of a serviceman's

brother for \$10,000, under the Servicemen's Indemnity Act of 1951, on account of the death of the serviceman in Korea. This case, said the court, came within the introductory clause of Section 10 of the APA barring review where "statutes preclude judicial review", since there is a clear provision for administrative finality in the enabling statute governing the Veterans' Administration. In holding this way, the court stated that the APA is a statute of general application. "As a general statute, it applies only where there is no inconsistent special statute applicable to the same subject matter. Any special statute then existing or thereafter enacted that is inconsistent with the general statute takes precedence over the latter. Under this rule of construction section 11a-2, being special, would control in all questions arising under the special statute." *Id. at 844*. It should be pointed out that this is a wholly erroneous way of interpreting the APA. The APA was intended to apply in all cases coming within its provisions, even though there was in existence some inconsistent special statute applicable to the same subject matter. It was, indeed, the very purpose of Congress to have the APA superimposed on all existing administrative law statutes. Where Congress intended otherwise (as in the introduction to Section 10—i.e., the very portion of the APA involved in this case), it was careful to give effect to its intention by express provision in the APA. And the same is true of statutes enacted after 1946. Under Section 12 of the APA, "No subsequent legislation shall be held to supersede or modify the provisions of this Act except

to the extent that such legislation shall do so expressly." This means that, unless a law passed after the APA states specifically that the Procedure Act is not to apply (as is done, for example, by the Immigration and Nationality Act of 1952, according to the cases discussed *supra*, p. 47-48), the APA's provisions will govern.

In *Heikkila v. Barber*, 345 U. S. 229 (1953), the Supreme Court held that an alien could not challenge the legality of a deportation order issued under the Immigration Act of 1917 in a declaratory judgment proceeding, asserting that such order could be attacked only by habeas corpus, as had been the case prior to the APA. In so holding, the Court rejected the view of three courts of appeals that the APA had made available to aliens a method of securing direct review of deportation orders. *Rubinstein v. Brownell*, 206 F. 2d 449 (D. C. Cir. 1953), held, however, that *Heikkila v. Barber* does not apply to cases arising under the Immigration and Nationality Act of 1952. So far as that statute is concerned, the court held, review in deportation cases is now available under the APA. On January 11, 1954, this decision of the court of appeals was affirmed *per curiam* by an equally divided Supreme Court. 346 U. S. 929 (1954).

According to *Batista v. Nicolls*, 213 F. 2d 20 (1st Cir. 1954), *Rubinstein v. Brownell* is not good law. Said Chief Judge Magruder there, "the affirmance of the Rubinstein case by an equally divided court is not authoritative precedent. * * * We are constrained not to accept the majority view of the Court of Appeals for the District of Columbia in the Rubinstein

case; we find no sufficient basis in the legislative history of the Immigration and Nationality Act of 1952 to justify disregard of the reasoning of the Supreme Court in *Heikkila v. Barber*." *Id. at 22*.

It should be pointed out that the above was said by way of *obiter*, for the court stated clearly that the petition was defective, even if *Rubinstein* were followed, both because the instant deportation order was issued before the 1952 Immigration Act became effective and because petitioner had failed to exhaust his administrative remedies. In view of this, the court's language concerning the *Rubinstein* case appears both unfortunate and uncalled for. The criticisms that have been directed against *Heikkila v. Barber* (see, e.g., 6 *Ad. L. Bul.* 21) certainly counsel against a needless resurrection of that case.

For cases following the *Rubinstein* decision, see *Lim Fong v. Brownell*, 215 F. 2d 683 (D. C. Cir. 1954); *Pedreiro v. Shaughnessy*, 213 F. 2d 768 (2d Cir. 1954); *Acosta v. Landon*, 125 F. Supp. 434 (S. D. Cal. 1954).

Compare *Heikkila v. Barber*, 216 F. 2d 407 (9th Cir. 1954) (Supreme Court decision in this case, *supra*, res judicata, so that review under APA still not available. *Rubinstein v. Brownell* does not change this as instant deportation order made before effective date of 1952 Immigration and Nationality Act); *Poy v. Sahli*, 125 F. Supp. 740 (N. D. Ill. 1954), which refuses to say whether *Rubinstein* or *Batista* is correct.

SCOPE OF REVIEW.—A decision of the Court of Appeals for the Second Circuit

restates the scope of review under the APA, as it applies in review cases arising under the Longshoremen's and Harbor Workers Compensation Act. According to Chief Judge Chase, "substantial evidence" means more than evidence which, considered by itself alone, would be sufficiently persuasive to induce the trier of fact to give it the credence and weight essential to support findings. It must have those characteristics to such an extent that in the setting made by the entire record the trier may reasonably find in accordance with it after giving due consideration to whatever else is shown both in opposition or in accord. Judicial review has been extended by the APA to embrace adequate exploration of the record as a whole to enable the reviewing court to arrive at its own judgment in determining that. In this case, the district court undertook to do so and made a thorough analysis of the evidence which led him to the conclusion, for the reasons he set forth at length, that the administrative finding that the death of the employee was unrelated to the injury of his employment was not supported by substantial evidence. But, said Judge Chase, that depended upon the credibility of the several witnesses who testified either that it was or that it was not, for the testimony either way, if believed, was undoubtedly adequate to support a finding in accordance with it. Where it cannot be said that the testimony was so inherently improbable that it was unworthy of belief as a matter of law, and that certainly was not so as to any of this testimony in respect to such a technical and complicated issue, the determination of the trier of fact

as to whether the evidence of one set of witnesses who testified before him rather than that of the other is the more reliable is controlling. *Gooding v. Willard*, 209 F. 2d 913 (2d Cir. 1954).

Foreman & Clark v. NLRB, 215 F. 2d 396 (9th Cir. 1954), is another case which discusses the scope of review under the APA. The reviewing court's task, says Judge Lemmon there, is to determine whether, in the light of the entire record in the case, the Board's findings were justified. In such determination, the court must be guided by two working principles: (a) The Board's findings are entitled to respect, because of the deference that should be paid to its "expertise" and (b) its findings must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both. "In striking a rational balance between these two considerations, it will not do for courts to give lip-service to the 'expertise' of an administrative agency, and then scrutinize with a captious eye and weigh with an apothecary's scale every finding made by such an agency. If there is on the record considered as a whole actually substantial evidence to support the findings, they should be upheld and the resulting order should be enforced." *Id.* at 398.

The court goes on, in another portion of its opinion, to emphasize the great weight that the judiciary should accord to the findings of administrative bodies, including the NLRB. Indeed, says Judge Lemmon,

“the Supreme Court has attributed to administrative boards powers that approach the psychic. We are told that such bodies are not limited to tangible evidence that ‘may be grasped thus’. Compared to courts, they are ‘better equipped * * * for weighing intangibles * * *.’ They may even rely upon intuition, provided it is ‘an intuition of experience which outruns analysis and sums up many un-named and tangled impressions,—impressions which may lie beneath consciousness without losing their worth.’ In the face of such massive authority, it is late in the day to scrutinize with a microscope the fact-findings of the Board. If, as here, they are supported by substantial evidence, they must stand.” *Id. at 405.*

The meaning of “substantial evidence” under the APA is discussed in *Mississippi Public Service Comm. v. United States*, 124 F. Supp. 809, 814-15 (S. D. Miss. 1954). Says Judge Mize there: “Substantial evidence is a legal term and presents to the court for adjudication a question of law. It is a term that frequently appears in the construction of many laws. There are many instances in which judgments are required to be supported by substantial evidence. The verdicts of juries in some states are required to be supported by substantial evidence and it then becomes a question for determination by the court as to whether or not a verdict is supported by substantial evidence and if it is not, then the court reverses and directs that judgment be entered when not supported by substantial evidence. * * * Substantial evidence is a term that cannot be defined definitely, but whether the evidence in a

particular case amounts to substantiality must be determined from the facts of each case as it arises.”

That the scope of review under the APA comes close to permitting the courts to weigh the evidence is the view of the Court of Appeals for the Eighth Circuit. According to Chief Judge Gardner, “it is incumbent upon this court in cases here on petition for review of an order of the National Labor Relations Board to consider the conflicting evidence and if it is our duty to consider it then we must pass upon its weight.” *Local No. 3, Etc. v. NLRB*, 210 F. 2d 325, 330 (8th Cir. 1954).

E. Brooke Matlack, Inc. v. United States, 119 F. Supp. 617 (E. D. Pa. 1954), indicates, on the other hand, that the scope of review, even under the APA, is still a most narrow one. The agency there—the ICC—had refused to accept the recommendation of its examiner. Even so, said the court, the Commission must be upheld. “Were this a matter of first impression and if it were the duty of the court to weigh the evidence, any finding other than that made by the examiner would be contrary to the evidence and the weight of the evidence and would have to be set aside on that basis. But such is not the case and we do not undertake to evaluate the evidence. We merely look to see whether the Commission has fulfilled the obligations imposed upon it by the Congress of the United States.” *Id. at 619-20.*

Compare *ABC Freight Forwarding Corp. v. United States*, 125 F. Supp. 926 (S. D. N. Y. 1954), where an ICC denial of a license application was upheld, despite a strong dissent which stated that “A re-

viewing court cannot substitute its own judgment for that of an administrative agency. But it should not accept a determination merely because made by such agency. The statutory scope of judicial review of administrative action is not at all confined to such action found to be 'arbitrary, capricious, and abuse of discretion, * * *.' Such scope includes the higher hurdle that administrative action must surmount, viz., whether or not it is 'unsupported by substantial evidence.' And 'substantial evidence is more than a mere scintilla * * *' it 'must do more than create a suspicion of the existence of the fact to be established.'" *Id. at 929.*

OTHER 1954 FEDERAL CASES

RIGHT TO BE HEARD.—*Ex parte Mota Singh Chohan*, 122 F. Supp. 851 (N. D. Cal. 1954), was a habeas corpus proceeding by an alien to attack an administrative order for deportation. The court held that an alien who petitioned for the suspension of deportation could not be denied discretionary relief on confidential information, but was entitled to a hearing at which to meet the allegations that he was not a worthy subject for the administrative grant of relief, and, unless a hearing was provided, habeas corpus would issue against the deportation order. Though the granting of suspension of deportation is discretionary with the Attorney General, his denial is reviewable for an abuse of discretion. And, says the court, in the absence of a full and complete hearing it

is not possible for it to determine whether there was a proper exercise or abuse of discretion on the part of the immigration authorities.

For other cases on the right to be heard, see *Illinois Cent. R. Co. v. Whitehouse*, 212 F. 2d 22 (7th Cir. 1954) (where labor association filed claim that agreement between association and railroad covered certain work being done by member of railroad brotherhood, the brotherhood and the member in question were involved parties, within Railway Labor Act, and were entitled to notice of hearings on the claim). *Sterrett v. United States*, 216 F. 2d 659 (9th Cir. 1954) (draft registrants who claimed conscientious objector status entitled to hearing on appeal); *Music Broadcasting Co. v. FCC*, 217 F. 2d 339 (D. C. Cir. 1954) (order of FCC directing daytime broadcast station which was conditionally permitted pre-sunrise operation to cease pre-sunrise operation because it caused objectionable interference with station unconditionally permitted to operate before sunrise merely required station to operate within terms of its authorization and did not constitute such modification of station's license as would give right to a hearing on merits of "modification"); *Webb v. State University of New York*, 125 F. Supp. 910 (N. D. N. Y. 1954) (lack of notice and hearing before adoption of resolution by administrative body not a denial of due process where legislative action of prospective nature is taken under valid delegation of powers from legislature).

SUBPOENAS.—The growth of agency investigatory authority in recent years is

one of the striking aspects of our administrative law. According to the Court of Appeals for the Fifth Circuit, the investigative powers of an agency are analogous to those of a grand jury. *Kilgore Nat. Bank v. Federal Petroleum Board*, 209 F. 2d 557 (5th Cir. 1954). Compare *United States v. Morton Salt Co.*, 338 U. S. 632 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186 (1946). This places a great burden upon a defendant in a subpoena enforcement proceeding who asserts that the material sought to be subpoenaed is irrelevant. In the normal case, a plaintiff has the burden of sustaining his cause of action. That rule does not, however, apply here, where the burden is on the private party to show irrelevancy, and not on the agency to show relevancy. "It therefore seems clear that the Board's stated finding of relevancy bears at least a prima facie stamp of correctness and is not required to be rejected by the court from which the Board must seek enforcement of its subpoena upon the opposition only of a plead denial. When conducting investigations within the limit of its lawfully granted authority, the Board does not occupy the position of a party to litigation and thus come within the axiomatic rule of adversary proceedings, relied upon by appellants, that generally upon the movant rests the burden of sustaining his right to proceed." 209 F. 2d at 560.

General Trades School, Inc. v. United States, 212 F. 2d 656 (8th Cir. 1954), also involved a subpoena enforcement proceeding, this time by the United States on an application by the Administrator of Veterans' Affairs for an order directing a

trades school corporation and its president to comply with the Administrator's subpoena. Respondent president of the trades school contended that the Administrator of Veterans' Affairs had been granted no authority by Congress to issue investigative subpoenas in relation to the educational and vocational-training program for veterans. Such subpoena power as is possessed by the Administrator admittedly rests upon 38 U. S. C. A. § 131 which, among its grants, authorizes the issuing of subpoenas by him "to make investigations and examine witnesses upon any matter within the jurisdiction of the Administration."

It was argued that the word "jurisdiction" in legal use has application to the exercise of judicial or quasi-judicial power only; that the Veterans' Administration has no such power to make adjudications or determinations as to the rights or duties of educational or vocational institutions under existing contracts entered into between the Administrator and such institutions for veteran-training; and that the Administrator therefore was without any authority to issue a subpoena to investigate the cost of the tools and equipment which the school was furnishing under its contract, on the purported basis of the question being a "matter within the jurisdiction of the Administration."

"But," said Judge Johnsen, "this concept of 'jurisdiction', in relation to the subpoena power under § 131, is one that is both artificial and unrequired. 'Jurisdiction' is not always used to connote the exercising of judicial or quasi-judicial power. 'It is a term in general use, of comprehensive and

large import, having different meanings, dependent on the connection in which it is found and the subject matter to which it is directed', and it is in fact 'often used without any determinate signification.' * * * And so it has been recognized that a legislative use of the term 'jurisdiction', in relation to the functioning of an administrative agency, is not necessarily one of legal technicalness but may be simply a general characterization of the field of powers and duties of that agency in administering or enforcing law." *Id. at 659*. And, used in this sense, it is clear that the subpoena at issue was to investigate a matter within the jurisdiction of the agency.

See, similarly, *Carroll Vocational Institute v. United States*, 211 F. 2d 539 (5th Cir. 1954). *Quaere*: whether under *Oklahoma Press Publishing Corp. v. Walling*, 327 U. S. 186 (1946) and *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501 (1943), the defense of lack of jurisdiction can be considered by the court in a subpoena enforcement proceeding. For a recent case, see *Tobin v. Banks & Rumbaugh*, 201 F. 2d 223 (5th Cir. 1953).

PLACE OF HEARING.—Does the private party in an administrative proceeding have a right to have the hearing held in a place convenient to himself or can he be compelled to come to Washington where the agency desires to proceed? This question was dealt with in *Jeffries v. Olesen*, 121 F. Supp. 463 (S. D. Cal. 1954), and the court's answer clearly implied the existence of the right in the private individual. The case referred to was an action to enjoin the enforcement of a fraud order issued by

the Postmaster General. Plaintiff had applied to have the agency hearing transferred from Washington, D. C., to Los Angeles where he resided, but his application had been denied. The agency's regulations permitted such applications to be made and provided that the "hearing examiner shall grant or deny such application having due regard for the convenience and necessity of the parties." The court held that the denial of plaintiff's application amounted to a violation of this procedural regulation, which, in legal effect, constituted a violation of the statute. The denial of the application in these circumstances cannot have been made with due regard to plaintiff's convenience and necessity. "Convenience aside, the obvious expense to plaintiff for transportation and maintenance of himself, his attorney and his witnesses on a round-trip journey of some 5,000 miles from Los Angeles to the Nation's Capitol should have been sufficient to prompt the transfer, if the Hearing Examiner had shown 'due regard for the * * * necessity of the parties' as the regulations required him to do." *Id. at 475*.

Though the decision is said by the court to turn on the agency's violation of its own procedural rule, it actually is of broader significance, since the rule in question seems merely to restate the last sentence in Section 5(a) of the APA. The decision can thus be said to lay down a broad rule on the right of the individual to have agency hearings held at places convenient to him. So construed, the decision has a great deal to commend it. "There is much to be said for the view that 'Big' Government, with its unlimited resources, should

be willing to contest with 'little' citizen on the latter's own ground. * * * Had the Government moved judicially in a court of law, instead of administratively in an executive department, to put plaintiff out of business, it would be shocking in the extreme to learn of a summons by the court purporting to call upon him to leave his residence in California and cross the continent to Washington, D. C. with his witnesses and his attorney, or else default in the defense of his property right. * * * It is equally shocking to learn that an administrative tribunal has so disregarded the necessity and convenience of a party defendant in an administrative proceeding." *Id. at 475-76.*

RIGHT TO TESTIMONY UNDER OATH.—In *Couto v. Shaughnessy*, 123 F. Supp. 926 (S. D. N. Y. 1954), a deportation case, it was contended that due process was violated because the official interpreter of the Immigration and Naturalization Service at the deportation hearing had not been sworn. The court held the contention to be without merit, stating that the individual concerned "was the official interpreter acting under his oath of office, and there is no more reason for putting him under a special oath in each separate case where his services are employed than there is for swearing a judge anew at each trial over which he presides." *Id. at 932.*

EVIDENCE.—*United States ex rel. Impastato v. O'Rourke*, 211 F. 2d 609 (8th Cir. 1954), contains a re-affirmation of what is by now almost hornbook law—that the rules of evidence applicable in courts

of law need not be followed in administrative proceedings. In the instant case, a deportation proceeding, hearsay evidence in the form of documents obtained in Italy was admitted and relied on by the agency. This, in the view of the court, did not make the hearing unfair. See, similarly, *United States ex rel. Matheos v. Garfinkel*, 119 F. Supp. 810 (W. D. Pa. 1954); *Acosta v. Landon*, 125 F. Supp. 434 (S. D. Cal. 1954). Compare *Couto v. Shaughnessy*, 123 F. Supp. 926 (S. D. N. Y. 1954).

The question of the admissibility of evidence in agency proceedings does not today present any real problems, in view of the established law illustrated by the above cases. The difficult question that still remains is that of the extent to which legally incompetent evidence can be relied upon to support a finding. In *American Rubber Products Corp. v. NLRB*, 214 F. 2d 47 (7th Cir. 1954), the Board had rejected a finding of the trial examiner on the ground that it was supported only by hearsay, saying that such testimony had no probative value to establish the fact found. The court held that the Board erred in holding that the evidence lacked probative value. The testimony in question, though it was hearsay, was uncontradicted. And, said the court, hearsay evidence, if not controverted, must be given its natural probative effect as if it were in law admissible. The court recognized that its holding appeared contrary to those in cases like *Willapoint Oysters v. Ewing*, 174 F. 2d 676 (9th Cir. 1949), where the court stated that an agency's findings, to be valid, could not be based upon hearsay alone. (Compare the so-called "legal residuum" rule enunciated

in *Matter of Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435 (1916)). The court distinguished such cases by the fact that, in them, the hearsay had been contradicted by other evidence. "It is apparent that, since the evidence was conflicting in the foregoing cases, they actually support only the proposition that hearsay evidence alone, if contradicted by clearly admissible direct evidence, is insufficient to support a finding. In the case at bar, however, no evidence was offered to contradict the hearsay evidence." 214 F. 2d at 52.

Compare *NLRB v. Haddock-Engineers, Ltd.*, 215 F. 2d 734 (9th Cir. 1954) (hearsay alone insufficient to support finding).

CROSS-EXAMINATION.—In *NLRB v. Milco Undergarment Co.*, 212 F. 2d 801 (3d Cir. 1954), the respondents urged that they were denied due process of law by the action of the trial examiner in refusing to permit the cross-examination of a Board's witness on a point which their counsel asserted was intended to impeach her credibility. The question disallowed did not of itself indicate the nature of the impeachment sought and while it appears to have been based upon a document which was submitted to the trial examiner for his inspection, counsel for respondents failed to make an offer of proof which disclosed its nature and contents sufficiently to enable the Board and the court to determine the relevancy of the question. The Board held that the trial examiner erred in so limiting the cross-examination of a material witness. Nonetheless the Board concluded that the error was nonprejudicial and it refused the respondents' motion to

reopen the hearing so as to permit the cross-examination. The trial examiner, who saw the document, apparently did not think that it would impeach the witness' credibility. "In any event," said the court, "the failure of respondents' counsel to disclose its details in an offer of proof leaves this court without any basis for holding that the Board erred in concluding that the trial examiner's action did not prejudice the respondents. Accordingly we cannot so hold." *Id.* at 802.

EX PARTE EVIDENCE.—A significant case is *Sheats v. United States*, 215 F. 2d 746 (10th Cir. 1954), an appeal from a conviction of refusing to submit to induction in violation of the Selective Service Act. Appellant contended that the action of the local board in refusing him the opportunity to examine the report of the hearing officer constituted the denial of procedural due process and rendered invalid the order for induction, and that therefore the refusal of the appellant to submit to induction did not constitute a criminal offense. The court upheld the contention and reversed the conviction. Under the relevant statute, if a registrant objects to a local board's refusal to grant his claim for exemption as a conscientious objector, he is entitled to an appeal. The appeal board is to refer the claim for hearing to the Department of Justice. The report of the hearing officer had been forwarded to the appeal board. It was before that board for consideration and no doubt was taken into consideration when that board acted. But the registrant did not see it, did not know of its contents, and did not have an oppor-

tunity to meet and respond to the unfavorable statements contained in it if they were not true. His request to see it was denied on the sole and single ground that it was in a confidential file. That such *ex parte* material cannot be used against the appellant is, according to the court, an elementary principle of fair procedure. "To say that a registrant must not be denied an opportunity to know and rebut adverse evidence in his selective service file before the local board and the appeal board and that an authoritative refusal to give him that opportunity constitutes a denial of procedural due process which renders invalid an order to submit to induction is merely to reiterate or restate an accepted principle of due process." *Id.* at 748-49. Compare *Mazza v. Cavicchia*, 105 A. 2d 545 (N. J. 1954), discussed in 7 *Ad. L. Bul.* 17.

But see *White v. United States*, 215 F. 2d 782 (9th Cir. 1954) (due process held not to require summary of FBI report to be disclosed to registrant in selective service case).

BIAS.—A decision in the Eighth Circuit, *Local No. 3, Etc. v. NLRB*, 210 F. 2d 325 (8th Cir. 1954), contains one of the rare instances in which a judicial finding of bias on the part of a trial examiner is made on review. According to Chief Judge Gardner, the examiner found as he did by discrediting positive testimony in many instances and by crediting the negative testimony of the employee. "The uniformity with which the examiner credited the negative testimony offered on behalf of the strikers and discredited the positive

testimony offered on behalf of the employer regardless of the fact that the evidence of the employer was corroborated in most instances by the surrounding facts and circumstances, convinces us of his bias and hostility." *Id.* at 329-30. But see *NLRB v. Pittsburgh S.S. Co.*, 337 U. S. 656 (1949) (bias not shown merely because examiner accepted witnesses for union as reliable and rejected those of employer as untrustworthy).

For another case where the court seems to have found partiality in the examiner, see *NLRB v. National Paper Co.*, 216 F. 2d 859 (5th Cir. 1954).

Compare *Acosta v. Landon*, 125 F. Supp. 434 (S. D. Cal. 1954) (bias of hearing officer not shown by fact he had private consultation with government counsel).

Another bias case is *Standard Distributors, Inc. v. FTC*, 211 F. 2d 7 (2d Cir. 1954), where the court found that the charge of bias and prejudice made against the trial examiner was so unfounded that the court declared that no discussion of it in detail would serve any useful purpose. There were times when the provocative conduct of counsel for the petitioners made the preservation of orderly procedure difficult and it seems clear that the charge of bias and prejudice grew out of resentment at rulings which were reasonably required to cope with that. Moreover, said the court, it should be noticed that the Commission reviewed the evidence and made findings of its own. The motion to substitute another trial examiner was not for the purpose of having new hearings in substitution for those already held, but to have the substituted examiner review the

evidence taken and submit a recommended decision which after all would have been only what its name implies and since the Commission did make findings of its own, any possible bias on the part of the trial examiner in recommending decision was so isolated as to be harmless.

Upon the facts as given, the court was probably right. If, however, its opinion can be construed to mean that where an agency reviews the evidence and makes findings of its own, that renders harmless any bias on the part of the hearing officer, then it is going too far. The private parties have an absolute right to a hearing before an unbiased examiner, and this right should not be affected by review of his action by an unbiased agency. It is difficult enough to prove bias on the part of any hearing officer. Add to it the duty of proving prejudice and the burden on the private party may well become an impossible one.

See *NLRB v. C. & J. Camp, Inc.*, 216 F. 2d 113 (5th Cir. 1954), where the court answered a claim of examiner bias by holding that instead of a slavish following by him of the union line and a consequent unconsidered and wholesale rejection of testimony favorable to the respondents, the examiner's intermediate report shows an impartial approach to, and an apperceptive and understanding appreciation of the evidence and its effect.

SEPARATION OF FUNCTIONS.—*Marcello v. Ahrens*, 212 F. 2d 830 (5th Cir. 1954), discussed *supra*, p. 47, held that deportation proceedings are not subject to the procedural requirements of the APA, since a spe-

cific procedure for such proceedings has been provided in the Immigration and Nationality Act of 1952. In *Couto v. Shaughnessy*, 123 F. Supp. 926 (S. D. N. Y. 1954), another deportation case, petitioner contended, however, that even if the Immigration Act of 1952 controls the status and tenure of Special Inquiry Officers, Section 242(b) of the Act denies due process and violates the Fifth Amendment in that it authorizes the Special Inquiry Officer also to present evidence. This was, of course, basically an attack upon the concentration of functions in the agency concerned. While there are, as a matter of policy, strong criticisms which may be directed against such concentration (particularly in the deportation field, as the Supreme Court pointed out in *Wong Yang Sung v. McGrath*, 339 U. S. 33), it has long been settled that it is not subject to constitutional attack. And this, as the instant court notes, is especially true in the immigration field. "Here the proceeding is executive in nature * * * Congress has the power to order the deportation of undesirable aliens and may establish the appropriate procedure. Therefore, a deportation hearing held in accordance with the provisions of a statute does not violate due process merely because some aspects of a judicial hearing are not followed. In order to contend that due process has been violated, there must be a substantial denial of justice. That the statute prescribes that a Special Inquiry Officer who conducts the hearing may also present evidence, by itself, is not a proposition so unreasonable as to constitute a substantial denial of justice and thus a deprivation of due proc-

ess.” 123 F. Supp. at 932. Compare *Farquharson v. Landon*, 217 F. 2d 603, 604-05 (9th Cir. 1954) (“neither citizen nor alien has a vested constitutional right in the doctrine of tripartite separation of powers”).

AGENCY REVIEW OF EXAMINER.—One of the most significant effects of the now-famous decision of the Supreme Court in *Universal Camera Corp. v. NLRB*, 340 U. S. 474 (1951), has flown from the Court’s holding that the findings of the examiner were to be considered upon review in determining whether an agency’s findings were supported by substantial evidence. For nothing is better calculated to result in a recognition of the importance of the examiner’s role than the realization that his findings in a case will be accorded due weight by the reviewing court. This naturally leads to a greater readiness on the agencies’ part to follow their examiners’ recommendations. And this, in turn, tends to make the examiner’s position a consequential one, recognized as such both by private parties and agency officials, in the process of administrative adjudication.

A number of 1954 cases uphold the examiner’s findings and reverse the agency for refusing to follow them—cases which are a direct consequence of the *Universal Camera* holding. A typical case is *Deep-freeze Appliance Div. v. NLRB*, 211 F. 2d 458 (7th Cir. 1954), where the court said, after citing the *Universal Camera* decision, “we conclude that the findings of the examiner were supported by the record as a whole before him, that not only is there no preponderance of the evidence in favor

of the complaint but that the Board, wholly without justification in the evidence, has ignored the examiner’s finding and in effect reversed it.” *Id.* at 461.

REASONED DECISIONS.—In *Ferguson-Steere Motor Co. v. United States*, 126 F. Supp. 588 (N. D. Tex. 1954), an action by a motor carrier to annul an ICC order, plaintiff raised the interesting claim that the Commission had not given sufficient reasons to support its order. The order in question was one suspending the operation of certain rate reductions made by plaintiff, under a statute authorizing the Commission to “suspend the operation of such schedule and defer the use of such rate * * *” by filing with such schedule and delivering to the carrier or carriers affected thereby a statement *in writing of its reasons for suspension*. In this case, the Commission had stated, as its reason for suspending plaintiff’s new rate schedules, “that the rights and interests of the public would be injuriously affected thereby.” Plaintiff urged that the so-called reason put forward by the Commission in support of its suspension order was not a reason at all but a mere excuse, indeed “is nothing more than a tired overworked phrase which says nothing and means less”, put forward as face saving in support of an order which would otherwise be mere flating; and that since this was so, the Commission had exceeded its authority in ordering a suspension without complying with the statute, and the order must be adjudged void, and its operation enjoined.

The court rejected plaintiff’s claim; de-

nying that the provision of the statute, for giving the carrier reasons, is mandatory rather than directory, in the sense that it is for the courts to test and determine the sufficiency of the reasons given. According to Judge Hutcheson, "we think it clear that, considering the reason given by the Commission in this case in the light of this compelling principle, it cannot be said of it that it was no reason at all and that the Commission, therefore, entered the order not in the exercise of its discretion and in compliance with the statute but without the exercise of discretion and in defiance of the statute." *Id. at 591.*

It should be noted that the court itself was far from convinced of the soundness of the ICC practice in this case. "This is not to say that we endorse, as the best type of administration, the practice, if it is the practice of the Commission of employing a rubric such as the one employed here to keep the promise to the ear while it breaks it to the hope of the carrier. Indeed, of quite the contrary opinion, we believe the Commission would be better advised to make as clear as it can in each case wherein lies the rub of the suspended rate or schedule. It is to say, though: that when, as here, the question is one of the power and duty of the Court to interfere because the Commission has acted in violation, or without the authority, of law, it is not for the Court to tithe mint, anise and cumin by rejecting the words chosen by the Commission to convey its reasons to the carrier; and that to sustain the attack upon the order would be to do just that." *Ibid.*

There was a strong dissent by Chief Judge Atwell, who emphasized that the

Commission could suspend a rate only by making a statement in writing of its reasons for such suspension. Having failed in this indispensable requisite, its subsequent action was void. As he rightly points out, the reason given by the ICC—"Rights and interests of the public"—is a mere generalization. It is a conclusion. This, in his view, hardly meets the statutory requirement that the Commission state the reasons for its action.

It would seem, to the present writer at least, that the merits of this case are all with the dissent. The so-called reason given by the ICC was only the ultimate general conclusion and really did not tell either the plaintiff or the courts why the agency had acted as it had. The implication of the majority opinion that the statutory provision is only directory, and not mandatory, appears even less valid. Unless the legislature was imposing a mandatory requirement, it is difficult to see what end it served by putting the provision in question into the statute. It is, to put it mildly, a little startling to say that a command to the agency to state its reasons is a mere instruction for the guidance and government of those on whom the duty is imposed. A better view would appear to be that the legislative requirement is mandatory. The failure to comply here should go to the "essence" as much as those defects in formal procedure that our courts have often held to invalidate transactions.

ADMINISTRATIVE ADVICE.—In *United States v. 449 Cases*, 212 F. 2d 567 (2d Cir. 1954), discussed *supra*, p. 50, in another

connection, the private party imported 449 cases of tomato paste under a contract which provided that he need not pay for it unless it was released from bond on its approval by the Food and Drug Administrator. On April 9, 1951, the Administrator (through a subordinate) having inspected it, gave the importer the necessary approval. As a consequence, the latter paid some \$9,000 to the seller. Some three months later, the Administrator re-inspected the shipment, declared it in violation of the Act, seized it and sought a court order confiscating it. The court held that the fact that the importer had relied on the Administrator's initial approval before paying the \$9,000 did not protect him. Legally, it would seem that the court was correct in this, for it has consistently been held that administrative advice is not legally binding on the agencies. It was, indeed, because of this that Section 5(d) of the APA was enacted. But that section's limitations have prevented it from making a really significant change in the pre-existing unsatisfactory situation. The fact that this tomato importer has had to join the unhappy company of the Idaho wheat farmer in *FCIC v. Merrill*, 332 U. S. 380 (1947), as well as others who have relied to their detriment upon advisory rulings which have not been adhered to by the agencies, indicates the pressing need for a more drastic solution—perhaps along the lines of a Good Faith Reliance Act, like that now before the Congress. See Newman, *Should Official Advice Be Reliable?* 53 Col. L. Rev. 689 (1953).

SECOND CHENERY RULE.—An interesting

decision of the Court of Appeals for the Second Circuit is comparable, in many respects, to the celebrated second *Chenery* case, *SEC v. Chenery Corp.*, 332 U. S. 194 (1947). In the case referred to, the NLRB sought enforcement of an order directing respondent employer to cease and desist from recognizing a union, which had been victorious in a consent election, as the bargaining representative of its employees. In addition to the cease and desist order, the Board had set aside the election, on the ground that respondent had improperly favored the union which had won, and directed the holding of a new election. The employer claimed that, under the Board's decisions at the time this proceeding arose, objections to an employer's pre-election interference could not be raised for the first time after the election by a union which agreed to the election. And, in this case, the trial examiner, relying upon this settled case-law, had recommended dismissal of the complaint. After the examiner's intermediate report, however, the NLRB decided in another case that where interference with the statutory right of employees to participate in a free and uncoerced election occurs after the execution of an agreement to hold a consent election but before the election, the Board will no longer treat such interference as having been waived and will consider on the merits any objections to such interference, even though raised for the first time after the election. The Board applied this decision to the instant case and set aside the election and issued the cease and desist order. The employer contended, in the enforcement proceeding, that it had been denied

due process of law by the retroactive application of the waiver rule enunciated in the other case. It was claimed that if the Board had applied the waiver rule which was in effect at the time the employer recognized the union, and under which an aggrieved union was deemed to have waived its objections to known pre-election interference if such objections were not filed prior to the election, the complaint would have been dismissed. It was accordingly asserted that the application of the Board's new waiver rule had the effect of retroactively converting into an unfair labor practice conduct which theretofore was entirely lawful.

This was essentially similar to the claim of the private party in the second *Chenery* case—i.e., that an agency cannot penalize conduct heretofore lawful by applying a newly established policy for the first time in an actual case. Instead, it was asserted, the agency had to lay down a rule in which those affected were informed of the prospective change in policy. In the instant case, as in *Chenery*, the court rejected the asserted limitation upon the agency's authority. Citing *Chenery*, Judge Medina declared that "It is well settled that where, as here, an administrative agency in pursuance of its adjudicatory function makes an *ad hoc* change in one of its administrative policies, such change may be applied retroactively in an appropriate case." *NLRB v. National Container Corp.*, 211 F. 2d 525, 534 (2d Cir. 1954). See, similarly, *Foreman & Clark, Inc. v. NLRB*, 215 F. 2d 396 (9th Cir. 1954).

The case just discussed should be compared with *E. Brooke Matlack, Inc. v.*

United States, 119 F. Supp. 617 (E. D. Pa. 1954). It was an action by a tank truck carrier to restrain the enforcement of an order of the ICC denying in part plaintiff's application for a certificate of public convenience and necessity relating to the transportation of bulk liquids and liquefied gas between Pennsylvania and New Jersey. The district court held that, where plaintiff had supported its application by the quantity and quality of proof indicated as necessary by previous decisions of the Commission, but the Commission, without making findings as required by the APA, denied the application in material respects and subsequently dismissed summarily plaintiff's petition for reconsideration and for further hearing, the Commission's action denied plaintiff a fair hearing.

The court conceded that a body like the ICC has the right from time to time to change its policies. The second *Chenery* case settled that an agency may from time to time promulgate standards expressing a more sensitive regard for what is right and what is wrong than those prevalent at a prior time. However, where, as here, an applicant relying in good faith upon previously determined standards, as expressed in previous written statements or conclusions of the agency, acts in strict accordance with such standards, such applicant should not be precluded from an opportunity to meet the revised standards if, without notice, the agency determines upon new and perhaps more sensitive standards. This is all the more true where, as here, the applicant has stated in writing and unequivocally that it is in a posi-

tion to meet such revised standards by competent evidence, if allowed the opportunity to do so.

PRIMARY JURISDICTION.—*Borne v. Laube*, 213 F. 2d 407 (9th Cir. 1954), arose out of an action against a local labor union and its trustee for the reinstatement of plaintiff as a member of the union, compensation for his loss of earnings because of the trustee's wrongful refusal of reinstatement, and exemplary damages. From a judgment of the district court dismissing the action on the ground that the subject-matter was within the NLRB's exclusive jurisdiction, plaintiff appealed. The court of appeals held that the district court's ruling was correct, as "commerce" was involved and the trustee's behavior amounted to an unfair labor practice within the Labor Management Relations Act, and that the Labor Board's jurisdiction precluded entertainment of the suit by the district court, though the Act does not expressly declare the Board's jurisdiction exclusive.

It was argued that the Board, although having authority to require the offending union to reinstate and financially to make whole the victim of the unfair labor practice, was without power to assess punitive damages; consequently, the view should be taken that Congress did not intend to preclude the victim from enforcing this private right in an action at common law. The court held, however, that since the Act provides a procedure for redress and a corresponding remedy, both the procedure and the remedy are exclusive in the absence of an express provision or Board

delegation to the contrary.

Another primary jurisdiction case is *Northern Pac. Ry. Co. v. United States*, 213 F. 2d 366 (8th Cir. 1954). It involved the issue as to which item of a railway tariff was applicable to particular shipments. The court held that the question as to whether the words "alcohol in bond", as used in the railway tariff of an interstate carrier, had by custom and usage come to mean "tax-free alcohol" was one of fact, which would have to be resolved by the ICC. According to the court, when it is contended that the words of a railway tariff of an interstate carrier are used in a peculiar or extraordinary sense, the preliminary determination of their meaning must be made by the Commission. A dissenting opinion held that the words at issue were used in their ordinary sense and hence their application to the undisputed facts of the case involved only a question of law for the courts.

For other primary jurisdiction cases, see *Constantin v. Martin*, 216 F. 2d 312 (10th Cir. 1954); *A. E. West Petroleum Co. v. Atchison, T. & S. F. Ry. Co.*, 212 F. 2d 812 (8th Cir. 1954); *Western Oil & Fuel Co. v. Great Lakes Pipe Line Co.*, 210 F. 2d 490 (8th Cir. 1954); *Switchmen's Union v. Ogden Union Ry. Co.*, 209 F. 2d 419 (10th Cir. 1954).

United States v. Kansas City Southern Ry. Co., 217 F. 2d 763 (8th Cir. 1954), deals with the procedure which the court is to follow in cases otherwise falling within its jurisdiction which raise a question which falls within the primary jurisdiction of an agency. It arose out of an action for damages by a shipper against a

carrier for a violation of the Interstate Commerce Act. The court held that the suit should be held in abeyance until a resort to the ICC could be made to have the questions within the latter's primary jurisdiction administratively determined. The carrier, in a petition for rehearing, strongly objected to the court's right to hold the action in abeyance, pending resort to the ICC, asserting that the court was totally without jurisdiction over the action itself. Only the ICC, said the carrier, had jurisdiction in reparation cases. The court held, however, that the statute itself would not seem on its face to leave any doubt as to its unconditional grant of the right to make a choice, so far as the mere matter of instituting a proceeding is concerned, between the remedies of seeking damages (reparations) administratively or judicially, for any alleged violation by a carrier of the provisions of the Interstate Commerce Act. According to it, nothing the Supreme Court has held is inconsistent with the existence of the judicial as well as the administrative remedy. It would seem, however, that the court's decision that there is jurisdiction in the district court is wholly inconsistent with *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), where the court held that, despite the seeming election of remedies in the Interstate Commerce Act, the doctrine of primary jurisdiction required the ICC to have exclusive jurisdiction in reparation cases. See *United States v. ICC*, 337 U. S. 426, 437 (1949), where the court stated that "it has been established doctrine since this court's holding in *Texas & P. R. Co. v. Abilene*

Cotton Oil Co. * * * that a shipper cannot file a § 9 proceeding in a district court where his claim for damages necessarily involves a question of 'reasonableness' calling for exercise of the Commission's jurisdiction."

EXHAUSTION OF ADMINISTRATIVE REMEDIES.—A number of cases apply the long-established rule requiring the exhaustion of agency remedies before recourse may be had to the courts. See, e.g., *Green v. Baughman*, 214 F. 2d 878 (D. C. Cir. 1954) (action by dismissed civil servant while appeal pending before Civil Service Commission); *Batista v. Nicolls*, 213 F. 2d 20 (1st Cir. 1954) (review sought of deportation order of hearing officer without invoking administrative remedy of appeal to Board of Immigration Appeals); *Holland Furnace Co. v. Purcell*, 125 F. Supp. 74 (W. D. Mich. 1954) (action to enjoin FTC and examiner from holding hearing until plaintiff afforded rights claimed by it under APA); *Stanard v. Olesen*, 121 F. Supp. 607 (S. D. Cal. 1954) (injunction denied against Post Office impounding order while administrative proceedings were going on to determine whether fraud order should be issued—*Quaere*: whether impounding order itself was not reviewable agency action).

In *Dupree v. Byrd*, 123 F. Supp. 656 (E. D. Pa. 1954), the exhaustion rule was applied to a newly created agency remedy, which had not existed at the time the action was originally brought. In the case referred to, a licensed master, who had been denied a security clearance certificate necessary for employment as master of a

vessel, on the ground that he was a poor security risk, brought an action against the Shipping Commission of the United States Coast Guard for an injunction to compel the issuance of a security clearance certificate. The court held that where the master had exhausted his administrative remedies at the time the action was brought, but the Coast Guard amended its regulations to provide a new administrative appeal, and the master, with actual knowledge of the amended regulation and right of appeal, refused to appeal under the amended regulation, the complaint was required to be dismissed because of the failure of the master to exhaust his administrative remedy under the amended regulation. Compare *Hobby v. Hodges*, 215 F. 2d 754 (10th Cir. 1954) (exhaustion rule applied to administratively created remedy of hearing, which could be granted or denied in discretion of agency).

Myers v. Bethlehem Shipbuilding Co., 303 U. S. 41 (1938), established the federal law to be that the rule requiring the exhaustion of administrative remedies could not be circumvented by the allegation (however persuasive it might be) that the agency was acting without jurisdiction in the given case. *Rice v. Walls*, 213 F. 2d 693 (6th Cir. 1954), applies the *Myers* doctrine in a case where the constitutional, rather than the statutory, jurisdiction of the agency was challenged. Said Judge Martin, "The rule appears well settled that where a statute provides for an administrative remedy a party is not entitled to injunctive relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. * * *

The rule is applicable in the present case even though the plaintiffs' constitutional rights are alleged to be violated." *Id.* at 697. See, similarly, *Elm City Broadcasting Co. v. NLRB*, 123 F. Supp. 838 (D. Conn. 1954); *Johns v. Baltimore & O. R. Co.*, 118 F. Supp. 317 (N. D. Ill. 1954).

An important case appears, however, to reject the *Myers* doctrine, though the court involved does not expressly state that it is doing so. The case referred to, *National Lawyers Guild v. Brownell*, 215 F. 2d 485 (D. C. Cir. 1954), arose out of the Attorney General's attempt to designate plaintiff as a subversive organization. Plaintiff brought this action attacking the validity of the executive order establishing security requirements for governmental employees and the procedural rules adopted by the Attorney General in its implementation, wherein plaintiff sought to enjoin the Attorney General from proceeding with an administrative hearing. The district court denied a preliminary injunction, and plaintiff appealed. The court of appeals held that the record warranted the conclusion that the interests of justice would be served best if the administrative hearing were held in abeyance pending the judgment of the district court upon the merits of the issues posed.

The court does not tell us, in its brief *per curiam* opinion, why the plaintiff here does not have to exhaust its remedies in the administrative process. Certainly, as a strong dissent points out, this case seems to come squarely within the *Myers* doctrine. According to the dissent, the court's decision "does violence" to the exhaustion rule. "The result, it seems to me, is lacunal

and a hecatomb to expediency. An association of lawyers should be in no better position than the ordinary litigant, while the 'interests of justice' are best served when matters take their accustomed and prescribed course." *Id. at 487.*

It should be noted, however, that on remand, the district court again dismissed the complaint on the ground that plaintiff had failed to exhaust its administrative remedies. *National Lawyers Guild v. Brownell*, 126 F. Supp. 730 (D. C. 1954). The court held that it was not precluded by the *per curiam* decision of the court of appeals from considering the contention that plaintiff's suit was premature. "The Court of Appeals decision, *supra*, does not support the Plaintiff's contention that it is not required to exhaust its administrative remedy. The Court's ruling did not touch upon this point. It merely held that the administrative hearing be held in abeyance pending the judgment of the District Court upon the merits of the issues involved." *Id. at 732.* And, on the merits of the issue raised by defendant, the court simply applied the *Myers* doctrine. It was contended by the plaintiff that its challenge of the basic authority for the designation of organizations exempted it from the general rule regarding the exhaustion of administrative remedies. Even in such a case, however, *Myers* tells us that plaintiff cannot circumvent the administrative process. Nor does it make any difference, as some of the cases already cited hold, that plaintiffs' objections were constitutional ones. "Further exhaustion of this remedy might obviate the need for consideration of these constitutional objections or at least render

precise the exact scope of determination necessary." *Ibid.* One may doubt whether the justification is really sound (and one can, indeed, even go further and doubt the soundness of the whole *Myers* doctrine), but it certainly seems that the decision of the district court is in line with *Myers* and the cases following its doctrine.

Compare *Westerbeke v. Local Draft Board*, 118 F. Supp. 441, 444 (E. D. N. Y. 1954) (there may be merit to proposition that judicial review is possible, regardless of the stage of the administrative process, where it is apparent on the undisputed facts that the agency acted without jurisdiction); *Fidalgo Island Packing Co. v. Phillips*, 120 F. Supp. 777 (D. Ala 1954) (fact that agency is unable to function because of dead-lock in voting members is to be taken into consideration in determining whether exhaustion rule should be applied); *International Union of Mine, Mill and Smelter Workers v. Farmer*, 218 F. 2d 42 (D. C. Cir. 1954) (attempt to enjoin NLRB investigation as beyond Board's authority); *Union Producing Co. v. FPC*, 127 F. Supp. 88 (D. C. 1954) (agency cannot unreasonably delay decision on application for administrative redress and then claim that applicant has not exhausted his administrative remedies).

ADMINISTRATIVE FINALITY.—An interesting variation of the administrative finality problem was presented in *Hormel v. United States*, 123 F. Supp. 806 (S. D. N. Y. 1954). As is well known, the enabling statute applicable to the Veterans' Administration contains the strongest provision for agency finality in our law. It provides

that "the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits or payments under any Act administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decisions." In the *Hormel* case, the Government contended that money was owed to it by certain veterans for amounts paid by the Government on the veterans' private life insurance policies. The Government claimed that the decision of the Veterans' Administrator that the money was owed came within the above quoted finality provision and could not hence be questioned in any court.

Judge Dimock held that the Government's point was not well taken. The finality clause in the statute applies only to gratuities sought by veterans and not to rights asserted by the Government. "I cannot bring myself to believe that the cited section means that the Administrator of Veterans' Affairs can decide that there is money due from servicemen to the Government under the Soldiers' and Sailors' Civil Relief Act and come into court and obtain a judgment against the servicemen upon the sole allegation that his determination has been made final and conclusive." *Id.* at 810. Indeed, Judge Dimock went on, if the Government's point were well taken, it would raise the serious constitutional question of whether the Fifth Amendment would not invalidate a law which would permit the Government to recover a judgment against a citizen without giving him an opportunity to challenge the bare asser-

tion of an administrative officer that money was due and owing.

FORMS OF REVIEW ACTION.—*Air Transport Association v. Brownell*, 124 F. Supp. 909 (D. C. 1954), was a case in which certain airplane transportation companies brought an action against the Attorney General and the Commissioner of Immigration and Naturalization for a declaratory judgment that the companies were not liable for extra compensation, with respect to airplanes arriving in the United States from ports of Hawaii, Alaska, and Puerto Rico, under a statute directing the Attorney General to fix the rate of extra compensation of inspectors and employees of the Immigration and Naturalization Service, who perform overtime services in connection with the examination and landing of passengers and crews of steamships, trains, airplanes, and other vehicles arriving in the United States from a foreign port, and for an injunction against assertion of liability and the bringing of suits. The district court held that ports of Hawaii, Alaska, and Puerto Rico were not foreign ports within the meaning of the statute. The agency construction in question was consequently *ultra vires*. The court held, however, that the application for an injunction would be denied. There is no reason why equity should enjoin someone from asserting that someone else is liable for the payment of a stated amount of money. The liability can be contested when and if suit to enforce it is brought. On the other hand, said Judge Holtzoff, insofar as concerns the prayer for a declaratory judgment, the matter is pre-

sented from a different aspect: It was asserted that the plaintiffs were exposed to a multiplicity of suits, as well as to a mounting liability for interest charges in case it should eventually be held that they were liable, contrary to their contention. It was proper, therefore, in a single suit, to adjudicate the liability at an early date. That is one of the purposes of the declaratory-judgment statute. Consequently the court was of the opinion that it was proper to grant a declaratory judgment, construing the statute and the authority of the Attorney General thereunder.

PARTIES.—One of the difficult questions before the courts in recent years has been that of the proper parties defendant in review proceedings. The landmark case is *Williams v. Fanning*, 332 U. S. 490 (1947), where the court held that the Postmaster General was not an indispensable party in an action to review the legality of a fraud order. Such action could be brought against the local postmaster, since the judgment against him would effectively grant the relief desired. This, in effect, permitted the plaintiff to bring the review action in the district of his residence, which meant, of course, that he would be far more ready to bring such action.

A number of cases in recent years, particularly in the field of deportation, have, however, continued to hold that review actions must be dismissed because of plaintiffs' failure to join agency superiors, who were indispensable parties. See 5 *Ad. L. Bul.* 48. The most recent such case is *Rodriguez v. Landon*, 212 F. 2d 508 (9th Cir. 1954), where the court held that the

Commissioner of Immigration was an indispensable party to any action seeking review of a deportation order. A case like this holds, in effect, that review actions can be brought only in the District of Columbia. They do this by requiring the action to be brought against the agency head, who can only be sued in Washington, rather than against the local official of the agency, who is most readily accessible to the individual seeking review. Such cases appear to distort the rule of *Williams v. Fanning*, where the Court greatly liberalized the requirement of parties defendant in review proceedings in order to facilitate the bringing of review actions. They are justified only if the goal of our administrative law is to make review as inconvenient and expensive as possible to those aggrieved by agency action. If, on the contrary, our aim is to insure availability of review upon the widest possible basis, there is no reason why actions cannot be brought in the district most convenient to the private party. It is formalistic fiction to treat the agency head as a private citizen who can be sued only in the district of his residence. It would normally cause little hardship to require the agency to respond in any district court. But, as far as the individual is concerned, requiring him to go to Washington to seek justice may be enough to induce him to forego his right of review.

An important case which realizes the truth of what has just been said is *Pedreiro v. Shaughnessy*, 213 F. 2d 768 (2d Cir. 1954). It was an action by a deportee for a declaratory judgment and injunctive relief under the APA, on the ground that

he had been denied due process during his deportation hearing. The court below dismissed the case on motion pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, as the action was brought against the District Director of Immigration and Naturalization for the District of New York, without joining either the Attorney General or the Commissioner of Immigration and Naturalization.

Judge Medina starts his characteristically forthright opinion by stating "To those who have spent the greater part of their professional lives manipulating procedural devices in the ebb and flow of practice at the bar it sometimes seems that in the very areas of the law where simplicity and flexibility of procedure are most indispensable are found a morass of complexities. This case provides an illustration." *Id.* at 768-69.

Particularly in the field of deportation, Judge Medina goes on, are cases dismissing on the technical ground unduly harsh. "The aliens involved in deportation proceedings are often in poor financial circumstances; the validity of final orders of deportation generally, if not always, depends upon questions relating to the alleged infringement of the deportees' constitutional rights; their imprisonment or enlargement on bail and the actual deportation itself affect human relationships of the highest consequence. Under these circumstances it would seem that the courts must be able to spell out some simple formula, which will cut through red tape, face realities, and provide an expeditious and inexpensive remedy, with a minimum amount of procedural frills and a maxi-

mun amount of attention to the question of whether or not the administrative proceedings against the deportee have conformed to the requirements of due process." *Id.* at 769.

Judge Medina concludes by holding that, in a case like this, the superior officers should not be held to be indispensable parties. "To require the joinder of the Commissioner of Immigration and Naturalization or the Attorney General under these circumstances would, we think, sacrifice substance to mere form and serve no other purpose than perhaps to deny all relief short of habeas corpus to an indigent alien deportee, whose constitutional rights are just as sacred in the eyes of the law as those of a citizen." *Id.* at 770. See, similarly, *Aguilera-Flores v. Landon*, 125 F. Supp. 55 (S. D. Cal. 1954).

Compare *Poy v. Sahli*, 125 F. Supp. 740 (N. D. Ill. 1954), where the court, in refusing to apply the *Pedreiro* holding to the facts of that case, states that the case-law "should be disconcerting to those who argue that the application of the Administrative Procedure Act will in itself provide some help to distressed aliens: it is clear that many jurisdictional rules must be rewritten before prospective deportees may sue for relief in a convenient forum. And it is on this key point that I find myself in disagreement with the Court of Appeals for the Second Circuit, which believes, to use the words of Justice Medina, in the *Pedreiro* opinion [213 F. 2d 769], that 'the courts must be able to spell out some simple formula, which will cut through red tape.' I should like to cut through red tape, in this case as in all

others, but I am bound both by judicial precedent and by legislation. If any 'simple formula,' like the one suggested by the Court of Appeals for the Second Circuit, is to be devised to avoid harsh and inhumane results in these immigration cases, it must, in my opinion, be devised by Congress, and not by the courts." *Id.* at 743.

REVIEWABLE AGENCY ACTION.—It is well known that whether particular agency action is reviewable depends upon whether such action is "final". And, as Justice Frankfurter has pointed out, Government action is "final" in the sense here involved when at no future time will its impact on the petitioner become more conclusive, definite or substantial. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 154 (1951). Since the famous *Rochester Telephone* case, 307 U. S. 125 (1939), it has been clear that whether agency action is final for the purposes of availability of review does not depend on the form of the action, but on its effect. This is the basis for a recent decision in the Eighth Circuit, where the court declared that to constitute a final order which would be reviewable, the Reconstruction Finance Corporation's order declaring invalid a meat subsidy which had already been paid to a livestock slaughterer did not have to follow any particular technical form, but that a letter, which stated that the described May claim for cattle and calves was invalid as certified for an over the quota slaughter in violation of a certain directive and that interest at 4 per cent from date of disbursement until paid would be due, was sufficient. *United States*

v. Bass, 215 F. 2d 9 (8th Cir. 1954).

In *Isbrandtsen Co. v. United States*, 211 F. 2d 51 (D. C. Cir. 1954), the issue was whether a challenged order of the Federal Maritime Board was sufficiently final to be reviewable. The order in question was one which permitted a proposed dual rate system of a voluntary association composed of eighteen common carrier steamship lines, to go into effect within 48 hours and which denied requests by an independent steamship line and the Attorney General for an immediate hearing of the issues prior to initiation of the system and for suspension of the system pending such hearing. The Board had, it should be noted, granted a hearing at a date subsequent to the institution of the system.

The opinion of Judge Bazelon starts by stating the tests of reviewability. Whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action. Thus, administrative orders are ordinarily reviewable when they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process. Under this test, a final order need not necessarily be the very last order.

The court held that the order under review met the test of finality. The Board insisted "that in declining to suspend the rates, [it] took only interlocutory action of a discretionary nature such as is not ordinarily reviewable." That action, however, said the court, attaches grave consequences to contractual and other business

relations of Isbrandtsen. By denying Isbrandtsen's request to postpone operation of the dual rate system and to grant an immediate hearing, the Board virtually removed Isbrandtsen from the shipping market involved. Whether this removal was temporary or permanent, Isbrandtsen would inevitably suffer "real, immediate and incalculable" harm. The Board's action was just as determinative of Isbrandtsen's rights as it would have been had the Board specifically and affirmatively approved the dual rate system agreement in accordance with the statutory requirements, or ruled that such approval was not required. "In these circumstances, it can hardly be said that the action assailed is not ripe for review, or that [Isbrandtsen] should be required to exhaust a dubious opportunity for hearing offered to them after the ax had fallen." *Id.* at 56.

The same liberal approach toward the availability of review is to be found in other decisions. In *Embassy Dairy v. Camalier*, 211 F. 2d 41 (D. C. Cir. 1954), the district court had dismissed a complaint because the plaintiff had "no present standing enabling it to make this challenge." The Court of Appeals reversed because it thought the allegations of the complaint stated a case for equitable relief. These allegations, which must be accepted as true for present purposes, disclosed the following: that Embassy had substantial contracts for supplying milk to consumers outside the District of Columbia; that to fulfill these contracts it must bring raw milk into the District for processing since its plant, which represents a million dollar investment, was located

there; that, until barred by the Commissioners' November 1952 order, Embassy was permitted to and did bring milk into the District for this purpose; that it protested unsuccessfully to the Commissioners that the bar thus imposed was in excess of their statutory authority; and that since there was no further administrative remedy it was faced either with the imminent and irreparable loss of a portion of its business or, alternatively, with the risk of criminal prosecution for violating the Commissioners' November 1952 order. Thus, the complaint asserted, in effect, that there had been a legislative declaration of rights, that there was an inadequacy of administrative review, and that there was occasion to resort to equitable remedies. According to the Court of Appeals, these are "the elements" said by the Supreme Court in *Columbia Broadcasting System v. United States*, 316 U. S. 407 (1942), to be "prerequisite to judicial review."

Union Producing Co. v. FPC, 127 F. Supp. 88 (D. C. 1954), is another case where the court rejected an agency claim that the review action was premature. Plaintiff there sought to enjoin the Federal Power Commission from enforcing against plaintiff the Commission's orders requiring natural gas companies to file rate schedules with the Commission and apply thereto for certificates of public convenience and necessity, on the ground that the plaintiff was not subject to the Natural Gas Act, and on the further ground that the orders were said to have been illegally issued.

Judge Holtzoff begins his opinion by

stating that the question whether this action is premature involves the query whether a justiciable controversy has arisen as between the plaintiff and the Commission. It is natural, says he, "for any person who is in doubt whether certain regulatory statutes or regulations are applicable to his business, to wish to obtain an official and binding determination on this point, in order that he may govern his course of action accordingly. Such desires have been increasing because of the growing complexities of modern business and the expansion in the scope and the intricacies of the regulatory activities of the Government. On the other hand, we must sedulously safeguard the tripartite division of Government. One of its basic principles is that the courts may not encroach on executive and legislative powers by giving advisory opinions and that judicial power may be invoked and exercised only for actual cases or controversies. In other words, there must be a justiciable controversy in order to justify the application of the judicial process." *Id. at 90-91.*

According to the learned judge, the case-law on the subject is confusing because of the unresolved conflict between *Columbia Broadcasting System v. United States*, 316 U. S. 407 (1942) and *Eccles v. Peoples Bank*, 333 U. S. 426 (1948). The first of these cases, says Judge Holtzoff, constitutes clear authority for maintaining the suit involved in the instant case. In the *Columbia Broadcasting System* case, however, Justice Frankfurter dissented, expressing the view that the action did not lie and that judicial review was

premature at the stage at which it was requested. On the other hand, several years later, in *Eccles v. Peoples Bank*, involving a similar situation, there having been a change in the personnel of the Supreme Court in the meantime, Justice Frankfurter wrote for the majority, holding that an action for a declaratory judgment brought by a member bank of the Federal Reserve System against the Federal Reserve Board to secure an adjudication of invalidity of a condition attached to the admission of the plaintiff to the Federal Reserve System, could not be maintained, inasmuch as the Board had taken no steps or made any threats to enforce the condition. Although this conclusion seems manifestly contrary to that reached in the *Columbia Broadcasting System* case, in which Justice Frankfurter wrote the minority opinion, he does not refer to the *Columbia Broadcasting System* case in his majority opinion in the *Eccles* case. No attempt was made to overrule, distinguish, or reconcile the *Columbia Broadcasting System* case.

Judge Holtzoff goes on to assert that "This is not an isolated instance in recent years of this justice writing a dissenting opinion in an earlier case, then delivering the majority opinion in a later case to the opposite effect without referring to the earlier case, but completely ignoring it." *Id. at 92.* He then states: "I am advertising to this circumstance as an indication that in recent years one member of the Supreme Court has attached no binding character to decisions of that tribunal rendered by a divided vote, if he himself were in the minority. The pertinency of this

consideration to the case at bar is that there is an uncertainty as to what weight should be accorded to decisions of the Supreme Court reached by a divided vote. Are such decisions to be regarded as binding and controlling precedents? Does the principle of *stare decisis*, which is fundamental in our system of jurisprudence, apply to them? The Columbia Broadcasting System case and the Eccles case seem inconsistent with each other. Each was decided by a divided court and the majority opinion in the latter case does not even mention the earlier decision." *Id.* at 93.

The problem raised by Judge Holtzoff is certainly a significant one. In the light of the attitude toward *stare decisis* held by at least some of the members of the highest Court, what are the lower courts to do in cases like this? What weight is to be given even to supposedly established landmarks in the law, when the Court often gives the impression that its decisions are in "the same class as a restricted railroad ticket, good for this day and train only?" Roberts, J. in *Smith v. Allwright*, 321 U. S. 649, 669 (1944).

In the instant case, as Judge Holtzoff puts it, he "recognizes and must face the fact that there is an uncertainty in the recent decisions on the question of the right to maintain such an action as the present suit. The court will resolve that doubt on the basis of what seems to be the correct principle and the dictates of substantial justice in favor of the plaintiff and feels that its conclusion is fully and amply supported by the leading case of *Ex parte Young* [209 U. S. 123 (1908)]." 127 *F. Supp.* at 94.

Compare *Music Broadcasting Co. v. FCC*, 217 F. 2d 339 (D. C. Cir. 1954) (order directing broadcast licensee to refrain from broadcasting before sunrise held reviewable despite claim of dissent that it was only temporary and tentative).

But compare *Midwest Coast Transport v. United States*, 125 F. Supp. 557 (D. S. D. 1954). In that case, an ICC order had denied the petition of a motor carrier seeking a determination of what commodities could be transported under its certificate of public convenience and necessity. It was held that since the order did not impose any obligations on the carrier nor involve a determination of any of its rights, the court was without jurisdiction to grant a declaratory judgment construing the provisions of the certificate and determining the rights and privileges of the carrier thereunder. Plaintiff contended that the requisite "case or controversy" originated in the informal opinion given to the plaintiff, at its own request, by the Director of the Commission's Bureau of Motor Vehicles. It is well established, however, said the court, that informal opinions of agencies do not give rise to a case or controversy, and cannot be judicially reviewed. The Commission's order did not grant or take away any rights from plaintiff. Neither did the informal opinion of the Director of the Commission's Bureau of Motor Vehicles constitute such an actual or threatened interference with plaintiff's rights as to give rise to a justiciable controversy within the meaning of the declaratory judgment statute. Plaintiff is in exactly the same position today as it was prior to the entry

of the Commission's order. It may urge the same defenses to any action which may be brought by the Commission under the Motor Carrier Act, which it urges as grounds for affirmative relief in this case.

Another case where the court held that reviewable agency action was not involved in the case is *Nukk v. Shaughnessy*, 125 F. Supp. 498 (S. D. N. Y. 1954). It involved a suit by aliens against whom final orders of deportation had been entered but not yet executed for a declaratory judgment to invalidate section 242(d) of the Immigration and Naturalization Act of 1952 and the regulations promulgated thereunder which provided for and described the conditions of compliance with supervised parole for deportees, and for certain injunctive relief. The court held that where such suit for declaratory judgment named as defendant a subordinate official of the Immigration and Naturalization Service who had no authority to enforce the regulations in question, and where it was not alleged that plaintiffs had violated the terms of the statute under attack, thereby subjecting themselves to criminal prosecution, there was no actual and existing dispute between plaintiffs and defendant, and in the absence of such justiciable controversy, the court would not render a purely advisory opinion.

According to Judge Medina, who delivered the opinion of the three-judge district court, nowhere was it alleged that any of the plaintiffs had violated the terms of the statute under attack. A wilful failure to comply with the regulations issued under Section 242(d) is a penal offense punishable upon conviction by imprisonment

and fine. Thus if they refuse to comply with the conditions of their parole, it is the Attorney General or the United States Attorney for the district in which the parole conditions will have been violated who will determine whether or not plaintiffs or any of them should be prosecuted. For aught that now appears there may be no actual prosecution of any of these plaintiffs, and the factual background indispensable to the determination of any such prosecution, should it take place, is in futuro and as yet non-existent.

JURISDICTIONAL FACT.—It is usually asserted that the “jurisdictional fact” doctrine as a basis for broadening the scope of review has been discarded by the federal courts. This may well be true as far as the celebrated case of *Crowell v. Benson*, 285 U. S. 22 (1932), is concerned. But see *Pittsburgh S. S. Co. v. Brown*, 171 F. 2d 175 (7th Cir. 1948). It should not, however, be overlooked that *Crowell v. Benson* involved only one facet of the jurisdictional fact doctrine. *Ng Fung Ho v. White*, 259 U. S. 276 (1922), applied that doctrine to a different type of case, namely, one involving liberty of the person. The Court there held that an alien who claimed citizenship, against whom a deportation order had been issued, was entitled to a judicial trial *de novo* on the issue of citizenship. The *Ng Fung Ho* case was applied during the past year in *Ex parte Gros*, 123 F. Supp. 718 (N. D. Cal. 1954), where petitioner was held entitled to a judicial trial on the issue of citizenship in a habeas corpus proceeding to test the validity of a deportation order. The basis for this use

of the writ, said the court, is that jurisdiction exists in the executive to order deportation only if the person arrested is an alien; and that due process requires that a judicial determination of this jurisdiction be available before one residing in the United States who claims to be a citizen may be deported. The Government had argued that *Ng Fung Ho v. White* involved a person admitted to the United States as a citizen and, since the instant petitioner's prior entry was on a German passport, he was not entitled to the protection of a judicial hearing. The court held, however, that the asserted difference between this case and *Ng Fung Ho* was irrelevant.

It is not easy to determine why *Crowell v. Benson* has been abandoned while *Ng Fung Ho v. White* is still followed by our courts. Logically, there is no more reason for applying the jurisdictional fact doctrine in one case than in the other. It may be, as one commentator puts it, "That the *Ng Fung Ho* doctrine has endured while the doctrine of the *Ben Avon* and *Crowell* cases has disappeared is best explained in terms of the Supreme Court's view that personal liberty is entitled to greater protection than rights of property." *Davis, Administrative Law* 922. If this is true, its implications are disturbing. The life of the law may not be logic, but a legal system that is not logically consistent internally leaves much to be desired. If the jurisdictional fact doctrine is sound where the protection of personal rights is in issue, it is sound also where the question is one of the safeguarding of property rights. One wonders, however,

whether the distinction above is the true basis for the Court's adherence to *Ng Fung Ho v. White*. What was at issue there was a *constitutional* jurisdictional fact (i.e., Congress itself has no constitutional authority to deport a citizen). On the other hand, recent refusals of the courts to follow the implications of *Crowell v. Benson* have occurred in cases where the *statutory* jurisdiction of the agencies was challenged.

For another deportation case applying the rule of *Ng Fung Ho v. White*, see *United States ex rel. Leong v. O'Rourke*, 125 F. Supp. 769 (W. D. Mo. 1954).

JUDICIAL CONSIDERATION OF OBJECTIONS NOT RAISED BEFORE AGENCY.—One of the fundamental principles which our courts have developed in the law of review is that no objection to agency action can be raised on review which was not urged before the agency itself. *Colorado Interstate Gas Co. v. FPC*, 209 F. 2d 717 (10th Cir. 1953, on rehearing 1954), indicates, however, that even that principle will not be applied inexorably. In the case referred to, the court reversed a rate order of the FPC on the ground that it erred in excluding from the cost of service base the loss resulting from gasoline operations and remanded the case for further consideration. The court then granted the Commission's petition for rehearing because of its contention that the court was without jurisdiction to consider that question *sua sponte* since it was not first presented to the Commission by the private party in its petition to the Commission for rehearing.

In reaffirming its original decision, on

rehearing, the court stated that it was not correct, as stated by the Commission, to say that the private party did not object to the exclusion of its item. It did object thereto both in the original proceeding and in its petition for rehearing. It is true, however, that it did not place its objection on the legal ground upon which the court predicated its conclusions. But, the court went on, "aside from that we think that in reviewing the Commission's order we have inherent power to consider and correct manifest and substantial error appearing in the record which leads to an unjust end result and deprives Colorado of the opportunity of earning that which the law says is its right, namely, a fair return on its investment." *Id. at 732.*

The court was of the view that its conclusion that it had inherent power to note sua sponte basic erroneous legal conclusions adduced from established facts was strengthened by Section 10 of the APA which provides that "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions. * * * It shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity * * *." "To hold that we are precluded from considering the legality or constitutionality of the action of an administrative agency based upon facts found by it and unchallenged in the reviewing court would seem to make nugatory and meaningless these clear and positive mandates of the Section." *Id. at 734.* Com-

pare *Ward v. Anderson*, 208 F. 2d 48 (D. C. Cir. 1953).

VACATION OF ENFORCING DECREE.—A very interesting point, of great significance in a system like ours where there is such a great turn-over of administrative personnel, is discussed in the dissenting opinion of Judge Clark in *Rosenblum v. FTC*, 214 F. 2d 338 (2d Cir. 1954). The majority of the court there had granted, without any opinion, a joint motion of petitioners and the FTC asking the court to vacate a final decree entered by it in 1951 and to enter in lieu thereof a decree dismissing the entire proceeding. The original FTC order which the court had enforced was one of a considerable series ordering vendors and distributors of merchandise, books, and the like to cease and desist from using the word "free" with reference to an article which was not in fact given as a gift or gratuity.

The basis upon which the Commission took its present action of vacating its own order of December 19, 1950, and dismissing its original complaint in its entirety, as well as asking the court to do likewise, was that it had changed its position with respect to the use, in advertising, of the word "free." This change in policy was rather clearly due to a change in personnel of the Commission.

The significance of this case, according to Judge Clark, arises from the fact that "a like metamorphosis appears to be taking place with respect to other 'quasi-judicial' agencies, and other cases of this nature are clearly indicated. This involves a development of administrative

law perhaps too little appreciated by writers and experts in the field; it demonstrates how the impact of a regulatory law upon the regulated business can be completely changed or removed with no change whatsoever in the fundamental law or statute.” *Id. at 339.*

The key question, declares Judge Clark, raised by a case like this is “Is appellate self-reversal here to follow as a matter of course when a new agency personnel reinterprets the law?” *Ibid.* He goes on to say that, at any rate the issues thus opened up are too important in both their immediate and their potential implications to be settled by a purely pro forma ruling by the court at the behest of regulator and regulatee acting in concert and without representation of other possible interests.

In addition to the above, Judge Clark emphasizes two points. In the first place, says he, it is essential, in a case like this, for the agency to show that there has been (1) an opportunity for the presentation of objections (with resulting right to petition for review) by anyone, competitor or consumer, who has been induced to rely upon the previously stated law, and (2) a final order which shall not be retroactive, attempting to wipe out what has actually occurred in the past, but shall operate only prospectively from a definitely stated time.

And, secondly, he emphasizes that, even though the Commission and the petitioners have agreed, the judicial role is not merely that of giving effect automatically to their agreement. “Since the earlier administrative interpretation upon which we rested our enforcement decree not only has ‘seasoned or broadened into a settled admin-

istrative practice,’ * * * but has also been approved and adopted by the Supreme Court in *F.T.C. v. Standard Education Soc.* [302 U. S. 112 (1937)], the Commission should have the burden of demonstrating on a convincing new record that its changed view is a permissible, rational, alternative interpretation of the law. * * *

Although administrative interpretations are unquestionably entitled to great weight, they do not, unless reasonable, bind the courts which have a duty to exercise their own powers of decision, limited though those may be in this area of the law. * * *

Hence we should not expunge our earlier decree merely because the Commission, as now constituted, does not happen to like it. If administrative agencies may turn court enforcing orders on or off according to their shifting whims, then courts are abdicating the functions, however limited, actually assigned to them by Congress. We may not usurp administrative authority, but neither may we abdicate the judicial responsibility we have.” *Id. at 340.*

CHAIRMAN'S PAGE

While it is still too soon to report the results of the request contained in my letter of March 8 for voluntary contributions to the work of the Section for the current Association year, it can be reported that there was a gratifying early response. It is hoped also that, on the theory of helping those who help themselves, the Budget Committee of the Board

of Governors may be persuaded to increase the amount of the annual appropriation by the Association to the Section.

You will find in the following pages a current Directory of Section Members, which should be a matter of interest to all and of convenience to those actively engaged in Section work. The geographical arrangement of the directory will, it is hoped, suggest to each of you the names of lawyers in your neighborhood, or state, or adjoining states, who would benefit us and themselves by joining the Section. To assist each of you in following this suggestion with respect to at least one new prospect, an application card is enclosed. More are available on request either to me or to Miss Helen Duval at Association Headquarters, 1155 East 60th Street, Chicago 37. The Section dues of new members who file their applications between April 1 and June 30 will be credited to the next fiscal year, beginning July 1.

As the directory also shows, there is more to be worked for than an increase in membership as such. We have small representation in some states and none in others, and even in states where the membership is high it tends to concentrate in the larger cities. While the field of the Section's interest touches the professional activity of almost every member of the bar, it is not always recognized even by those whom it most directly affects as a separate field of the law. Thus in stimulating interest in the Section's work one must often first persuade a lawyer that he is himself practising administrative law, without knowing it. Perhaps this needs most to be done in the smaller com-

munities and more sparsely settled states. Each of you could do much in this direction.

In pursuance of the objective of broadening participation in the active direction of Section affairs, the Council at its recent mid-winter meeting voted to submit to the next annual meeting of the Section a By-law amendment which would increase the number of members-at-large of the Council from eight to twelve, each member to serve for a term of three years instead of four, thus doubling the number of new Council members to be elected each year.

We have been fortunate in obtaining space in The Warwick for this year's annual meeting in Philadelphia. The Section will meet on Monday afternoon, August 22, and all day Tuesday, August 23. A feature of the meeting will be consideration of the reports of the Hoover Commission and its Task Force on Legal Services and Procedure, including a Tuesday breakfast meeting on that subject to be held jointly with the Federal Bar Association.

In the last issue I listed the regional meetings of the Association scheduled through April of 1956.

Our program committee for the Pacific-Southwestern Regional Meeting at Phoenix, under the effective chairmanship of Charles H. Woods of Tucson, has prepared a program for Thursday afternoon, April 14, centered on problems of state administrative law but to be graced and enlivened by a speech by Whitney R. Harris, Ex-

ecutive Director of the Association and Staff Director of the Hoover Commission Task Force on Legal Services and Procedure, on the Report of the Hoover Commission. There will be two other speeches of moderate length, by Carl Kuchman of Sacramento on California Administrative Law and Procedure, and by your Section Chairman on the Model State Administrative Procedure Act; following which there will be general discussion of problems of state administrative law, with a panel made up of representatives of the states in the region (Arizona, California, Colorado, Nevada, New Mexico and Utah). It is hoped that this will elicit as much interest as did our session at Portland last May.

Plans are also under way for the Big Seven Regional Meeting, which will be held at Cincinnati for the States of Illinois, Indiana, Kentucky, Michigan, Ohio, Tennessee and West Virginia. Our program there, scheduled for Friday morning, June 10, will be developed under the chairman-

ship of L. Clair Nelson, formerly Chairman of the National Committee.

You will find in the March issue of the American Bar Association Journal (41 A.B.A.J. 275) an account of matters of recent interest, including the introduction of bills in the 84th Congress to deal with the impounding of mail in the course of fraud, lottery and obscenity proceedings before the Postmaster General (a subject discussed in the last issue of the Bulletin, 7 Ad. L. Bul. 33-4). Your officers are continuing their activity in this regard, but at the present writing there is nothing further to report.

We are grateful to the President's Conference on Administrative Procedure for making available to us without cost copies of its final report for distribution to all Section members. These will reach you shortly.

ROBERT M. BENJAMIN
Chairman

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315 Montgomery St. (4)

San Mateo

David Francis Doyle
25 Longview Court
Hillsborough

Stanford

Matthew Stafford
Stanford Research Inst.

Vallejo

Russell F. O'Hara
525 Capitol St.

West Sacramento

John E. Fourt
1836 Rockrose Road

Colorado

Aurora

Ed Higbee
716 Peoria St.

Denver

Charles J. Beise
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Frederic L. Kirgis
Equitable Bldg. (2)

John P. Thompson
3061 S. Ash St. (22)

Connecticut

Bridgeport

Norman King Parsells
886 Main St. (3)

Hartford

John Laurence Collins
50 State St. (3)

James Hall Kinsella
386 Fairfield Ave. (6)

John S. Murtha
93 Elm St. (14)

Olcott D. Smith
750 Main St. (3)

New Haven

Jeremiah D. Shea
185 Church St. (10)

Delaware

Wilmington

Roger R. Horton
Atlas Powder Company

John R. L. Johnson, Jr.
Delaware Trust Bldg. (28)

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Apt. 507 (8)

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Shoreham Bldg. (5)

Fred W. Albertson
Munsey Bldg. (4)

Isadore G. Alk
Woodward Bldg. (5)

Nicholas E. Allen
1420 New York Ave.
N.W. (5)

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1025 Vermont Ave. (5)

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839—17th St., N.W. (6)

Ralph E. Becker
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World Center Bldg. (6)

Martin W. Bell
Commonwealth Bldg. (6)

Wendell Berge
1200—18th St., N.W. (6)

Raoul Berger
Ring Bldg. (6)

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Herbert M. Bingham
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Frederick D. Binkley
6427 Utah Ave., N.W. (15)

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1741 K St., N.W. (6)

Carlile Bolton-Smith
3007 Que St., N.W. (7)

Sanford H. Bolz
425—13th St., N.W. (4)

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Smith W. Brookhart
1025 Conn. Ave., N.W. (6)

Neil Brooks
3215 Morrison St., N.W. (15)

E. Fontaine Broun
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John Paulding Brown
1911 R St., N.W. (9)

Thad H. Brown
1771 N St., N.W. (6)

Lloyd Buchanan
4616—47th St., N.W. (16)

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Clayton Lee Burwell
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4471 MacArthur Blvd.,
N.W. (7)

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5035 Macomb St., N.W. (16)

Simon J. Nash
3800 Porter St., N.W. (16)

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Barr Bldg. (6)

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L. K. Olson
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Woodward Bldg. (5)

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Apt. 42 (5)

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Bowen Bldg. (5)

L. Welch Pogue
Southern Bldg. (5)

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116—4th St., N.E.

Rufus G. Poole
1625 K St., N.W. (6)

John H. Pratt
American Security Bldg. (5)

Ganson Purcell
Barr Bldg. (6)

William A. Quinlan
1317 F St., N.W. (4)

Barrett Quirk
1625 K St., N.W. (6)

David Reich
Warner Bldg. (4)

Gerard D. Reilly
1401 K St., N.W. (5)

James Francis Reilly
1625 K St., N.W. (6)

Paul Miller Rhodes
1620 Eye St., N.W. (6)

Brice W. Rhyne
726 Jackson Pl., N.W. (6)

Charles S. Rhyne
726 Jackson Pl., N.W. (6)

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N.W. (10)

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1025 Conn. Ave., N.W. (6)

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National Labor Relations
Bd. (25)

Frank Roberson
Munsey Bldg. (4)

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World Center Bldg. (6)

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1319 F St., N.W. (14)

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1735 De Sales St., N.W. (6)

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Munsey Bldg. (4)

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1625 Eye St., N.W. (6)

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John E. Shea
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Bldg. (25)

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